Owen J Roberts
John A Jones

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 691

139-270

QUAKER CITY CAB COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF PENNSYLVANIA

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED OCTOBER 14, 1936

(32,268)

of. as alleged to be the fact. The test is the purchase
the only basis of classification is that the
owner is a corporation. Natural persons
among the same property are not so
taxed. The effort to base it held a tax on
assets or income - as distinguished from
property - is to avoid the fatal basis of
classification. That was expressly held to
to avoid double taxation. The Fed
Court Pa was put aside without
due consideration.

(32,258)

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[fols. 1 & 2]

IN SUPREME COURT OF PENNSYLVANIA

(Writ of Error Filed September 15, 1926)

The United States of America, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Commonwealth of Pennsylvania, between, or some of you between Commonwealth of Pennsylvania ex Quaker City Cab Company, a manifest error hath happened, to the great damage of the said Quaker City Cab Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court together with this writ, so that you have the same at the City of Washington, D. C. within thirty days, in the said United States Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Scranton, Pa. the 14th day of September in the year of our Lord one thousand nine hundred and twenty-six.

Signed: G. C. Schemer, Clerk of the District Court of the United States. (Seal U. S. District Court, Middle District of Pennsylvania.)

June 30, 1917	$252 25	$25 23	$277 48
December 31, 1917	2,292 67	229 26	2,521 93
June 30, 1918	3,048 33	304 83	3,353 16
December 31, 1918	3,191 34	319 13	3,510 47
June 30, 1919	3,894 64	389 46	4,284 10
December 31, 1919	4,119 20	411 92	4,531 12
June 30, 1920	4,822 53	482 25	5,304 78
December 31, 1920	3,959 04	395 90	4,354 94
June 30, 1921	4,441 23	444 12	4,885 35
December 31, 1921	4,084 00	408 40	4,492 40
June 30, 1922	4,975 30	497 53	5,472 83
December 31, 1922	4,822 56	482 25	5,304 81
June 30, 1923	6,644 01	664 40	7,308 41

6. The vehicles used by defendant in its business aforesaid are self propelled motor vehicles operated by a driver who is an employe and agent of the defendant, such vehicles being limousines, touring cars and taxicabs. Each taxicab has an automatic meter which determines the fare to be charged the passenger for each trip. There are no meters on the touring cars and limousines, and the rate for the use of these is based upon the time consumed for each trip. Defendant does not operate such motor vehicles upon any schedule or over any fixed route or between any fixed termini. It operates such motor vehicles on the streets of Philadelphia from various stations or stands located in different sections of said City and transports or conveys individual persons and personal baggage upon demand and request to any point within its territory indicated by said passengers. The "Taxicab and Touring Car Fares" set forth in said Gross Receipts Reports are derived from the said business.

The defendant owns and operates a fleet of 325 taxicabs and 31 limousines and touring cars. It has about 50 stands, dispatch stations and telephone boxes located at various places in said City, to which drivers report for orders from the central office, to which central office patrons may call for a taxicab, limousine or touring car. No taxicab limousine or touring car or driver is assigned to any definite stand, but rotates between stands according to their location and frequency of orders received from patrons and

in the most general sense, the dealing in and dealing with the said vehicles and anything used or useful in connection therewith, or pertaining thereto.

The carrying on in all its branches of a taxicab transportation business, and the operation and maintenance of automobile stations, garages and repair shops.

To operate, through stock ownership or otherwise, any such company, corporation or association.

To acquire, by purchase or subscription or in any other manner, and to hold as an investment or otherwise, any bonds, shares of capital stock, securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, and while the owner thereof to exercise all and every the rights, powers and privileges of an ownership, including the right to vote thereon.

In any manner, financial or otherwise, to aid or to manage or to be represented in the management or to assist in the management of any corporation or association of which any bonds, stock, securities or evidences of indebtedness are held or owned by this corporation, directly or indirectly, and to do any act or thing designed to protect, preserve, improve or enhance the value of any such bonds, stocks, securities or evidences of indebtedness.

As subsidiary to and in connection with the foregoing, from time to time to exercise such.

To do a general transporting, marketing and trading business.

Acquire the good will, property, rights, franchises, contracts and assets of every kind and undertake the liabilities of any person, firm, association or corporation, either wholly or in part, and pay for the same in the stock, bonds or obligations of this corporation or otherwise.

Enter into, make, perform and carry out contracts of every kind and for any lawful purpose with any person, firm, association, corporation, municipality, state or government.

Without limitation, issue any of the stock, bonds, debentures or obligations of the corporation, and as the option of the corporation secure the same by mortgage, pledge, deed of trust or otherwise, and dispose of and market the same.

Remunerate to any extent and in any manner not prohibited by law any person or corporation for services in placing or assisting to market or underwriting any of the shares of stock or debentures or other securities of or belonging to the corporation, or in or about the formation or promotion of the corporation, or in the conduct of its business.

Acquire, hold, use, sell, assign, lease, grant licenses in respect of, mortgage, or otherwise dispose of letters patent of the United States or any foreign country, patents, patent rights, licenses and privileges, inventions, improvements and processes, trade marks and trade names, relating to or useful in connection with any business of the corporation. [fol. 12] Purchase, hold and reissue the shares of its capital stock as provided by law.

The corporation is expressly authorized to conduct business both in the State of New Jersey and elsewhere, meaning by the term "elsewhere" whenever used herein any of the states, territories, colonies or dependencies of the United States, and any and all foreign countries.

The corporation is also authorized to have one or more offices, and to hold, purchase, mortgage and convey real and personal property, without limit as to amount, within or (except as and when forbidden by local laws) without the State of New Jersey.

With a view to the working and development of the properties of the corporation, and to effectuate, directly or indirectly, its objects and purposes or any of them, the corporation is authorized, in the discretion of the directors, in connection with the stated objects and purposes of the corporation, from time to time to carry on any other business, manufacturing or otherwise, to any extent and in any manner not prohibited by the laws of New Jersey, or, where the corporation may seek to do such business elsewhere, by local laws.

The foregoing clauses shall be construed both as objects and powers, but no recitation or declaration of specific or special objects or powers herein enumerated shall be deemed to be exclusive, but it is hereby expressly declared that all other powers incidental to the stated purposes and objects hereof, now or hereafter permitted or granted under the laws of New Jersey, or by the laws of any other

state or country into which the corporation may go or do business, are hereby expressly included as if such other or general powers were herein set forth at length.

[fol. 13] EXHIBIT "B" TO STIPULATION

Commonwealth of Pennsylvania, Office of Auditor General, Harrisburg

January 3rd, 1924

Quaker City Cab Company, 1211 Vine Street, Philadelphia, Pa.

GENTLEMEN: An examination of the records in this Department indicates that you have neglected to file reports of your Gross Receipts received from the transportation of freight or passengers from the time of your incorporation, June 8th, 1917.

By the 23rd section of the Act of June 1, 1889, P. L. 420, a tax of eight mills is imposed on gross receipts of transportation companies incorporated under the laws of this Commonwealth, or under the laws of any other State or the United States, and doing business in this Commonwealth. The Act provides that reports must be filed by all such companies engaged in transportation of freight or passengers from points within the State to points within the State semi-annually for the six months' periods endings June 30th and December 31st of each year. The Act also provides that upon the failure of a corporation to make a report as provided by law, the Auditor General may estimate settlements against such company, together with penalties and interest, and from such settlement there is no right of appeal.

Before resorting to this procedure in your case, we are sending you under separate cover report forms for the periods beginning June 30th, 1917, and ending December 31st, 1923, inclusive, and would request that reports be submitted for each of the six months' periods between the above dates, answering in all cases all of the interrogatories contained in the report form.

Your prompt compliance with this request will prevent the necessity of estimating settlements against your company for the periods above mentioned.

Yours very truly, Chas. A. Waters, Chief of Corporation Bureau.

S.

[fol. 14] [File endorsement omitted.]

[fol. 15] In Court of Common Pleas of Dauphin County

[Title omitted]

Appeal from Gross Receipts Tax Settlement for Six Months Ending December 31, 1923

Opinion. Filed February 23, 1926

By the Court:

This case comes before us on appeal from the settlement of the gross receipts tax charged against the defendant corporation for the last six months of the year ending December 31, 1923, pursuant to Section 23 of the Act of June 1st, 1889, P. L. 420.

A stipulation was filed dispensing with a trial by jury under the provisions of the Act of April 22, 1874, P. L. 109. The case was heard December 10, 1925.

Facts

The facts which have been agreed upon we find as follows:

1. The defendant is a corporation incorporated under the laws of the State of New Jersey and is registered to do business in the State of Pennsylvania. It is incorporated, inter alia, for the transportation of passengers and goods by means of cabs, taxicabs, touring cars and limousines, and was engaged in the transportation or conveyance of passengers and their personal baggage in the City of Philadelphia, State of Pennsylvania, from June 8, 1917, to

and including the present time, and so operates as a common carrier under a certificate of public convenience issued by The Public Service Commission of the Commonwealth of Pennsylvania.

2. The defendant has consistently filed its capital stock and corporate loans reports with the Auditor General.

3. So far as it appears from an examination of the records of the Department of the Auditor General no demand [fol 16] was ever made upon the defendant by the Auditor General for any reports under Section 23 of the Act of June 1, 1889, P. L. 420, until January 5, 1924, when demand was made to file reports for the periods from June 8, 1917, to December 31, 1923.

4. February 4, 1924, the Auditor General made estimated settlements of taxes upon the provisions of said Section 23 of said Act of June 1, 1889, which were approved by the State Treasurer February 6, 1924, for the six months' period from June 8, 1917 to June 30, 1923. The defendant, on February 21, 1924, filed, under protest, its reports for the six months' periods from June 30, 1917, to December 31, 1923, showing its receipts derived as set forth in said reports, from "taxicab and touring car fares", within the City of Philadelphia aforesaid, said information being given upon blanks supplied by the Auditor General. On February 28, 1924, the Auditor General made resettlements of taxes for the six months' periods from June 30, 1917, to June 30, 1923, and a settlement of tax for the six months' period ending December 31, 1923, based upon the amount of receipts derived, as aforesaid, within such six months' periods, as set forth in the said reports, which resettlements and settlement were approved the State Treasurer March 3, 1924. The report of the defendant for the period from June 8, 1917, to June 30, 1917, showing its receipts, as aforesaid, for such period, was filed February 28, 1924, and a resettlement of the tax for the said period was made by the Auditor General March 4, 1924, and approved by the State Treasurer March 6, 1924. The amount of such receipts, as aforesaid, for the six months' period ending December 31, 1923, as set forth in the report for said period was $649,734.92, and the amount of such tax settled thereon

was $5,197.88, from which settlement the present appeal was taken by the defendant.

5. The records of the Auditor General and State Treasurer show that the said settlement and resettlements of tax claimed under the provisions of said Section 23 of the Act of June 1, 1889, were made by the Auditor General and approved by the State Treasurer against the defendant upon the dates set forth in paragraph 4 hereof, together [fol. 17] with penalties for failure to file the reports within the time required by said Section 23 as follows:

Period ending	Tax	Penalty	Total
June 30, 1917	$252 25	$25 23	$277 48
December 31, 1917	2,292 67	229 26	2,521 93
June 30, 1918	3,048 33	304 83	3,353 16
December 31, 1918	3,191 34	319 13	3,510 47
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June 30, 1922	4,975 30	497 53	6,472 83
December 31, 1922	4,822 56	482 25	5,304 81
June 30, 1923	6,644 01	664 40	7,308 41

6. The vehicles used by defendant in its business aforesaid are self propelled motor vehicles operated by a driver who is an employe and agent of the defendant, such vehicles being limousines, touring cars and taxicabs. Each taxicab has an automatic meter which determines the fare to be charged the passenger for each trip. There are no meters on the touring cars and limousines, and the rate for the use of these is based upon the time consumed for each trip. Defendant does not operate such motor vehicles upon any schedule or over any fixed route or between any fixed termini. It operates such motor vehicles on the streets of Philadelphia, from various stations or stands located in different sections of said city and transports or conveys persons and personal baggage upon demand request to any point within its territory indicated by said passengers. The "taxicab and touring car fares" set forth in said Gross Receipts Reports are derived from the said business.

The defendant owns and operates a fleet of 325 taxicabs and 31 limousines and touring cabs. It has about 50 stands, dispatch stations and telephone boxes located at various places in said city, to which drivers report for orders from the central office, to which central office patrons may call for a taxicab, limousine or touring car. No taxicab, limousine or touring car or driver is assigned to any definite stand, but rotates between stands according to their location and frequency of orders received from patrons and from the central office. Patrons may come to the various stands for said taxicabs where they are held for hire. De- (fol. 18) fendant also derives a large portion of its revenue from patrons who do not call to central office or do not come to the various stands, but hail a cab when it is traveling on the streets.

7. The defendant is subjected to competition in its business by individual, partnership and unincorporated taxicab operators.

8. The Auditor General, on August 4, 1924, taxed defendant $421.35 upon its income received from taxicab and other fares for the year 1923 under the provisions of the Emergency Profits Tax Act of June 28, 1923, P. L. 876. On December 23, 1924, the Auditor General voluntarily resettled and struck off said tax.

Other facts will be developed by the discussion which is to follow.

Discussion

The question involved is whether the defendant, incorporated, inter alia, for the purpose of the transportation of passengers and goods by means of cabs, taxicabs, touring cars and limousines, and engaged in the transportation of passengers and their personal baggage in the City of Philadelphia, and so operating as a common carrier under a Certificate of Public Convenience issued by the Public Service Commission of the Commonwealth of Pennsylvania, is subject to the provisions of Section 23 of the Act of June 1, 1889, P. L. 420, and required to pay the tax imposed by the said section of said act, which provides, inter alia, as follows:

"Section 23. That every railroad company, pipe line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint stock association or limited partnership, now or hereafter incorporated, or organized by or under any law of this commonwealth or * * * or any other state * * * and doing business in this commonwealth, and owning, operating or leasing to or from another corporation * * * any railroad, pipe line, slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or oil * * * shall pay to the State Treasurer eight (8) mills on the dollar upon the gross receipts of said corporation * * *, received from passengers and freight traffic transported wholly within this state. * * *"

That the defendant is a common carrier of passengers and their personal baggage, operated as such under a certificate of public convenience issued by Public Service Com- [fol. 19] mission of Pennsylvania; that the touring cars, limousines and taxicabs are vehicles; that they are owned and operated by the defendant, that they are used in the transportation of passengers and their personal baggage, that a charge is made for such transportation, that the vehicles are held for public hire, and that the defendant has stands in various places in the City of Philadelphia where vehicles are held for hire, is not controverted.

When interpreting this act of assembly certain fundamental rules must be borne in mind:

(1) "The first rule of interpreting statutes requires us to seek the legislative intent in the language of the law itself." Commonwealth v. Monongahela Navigation Co., 66 Pa. 81.

(2) "It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation." R. C. L., Vol. 25, page 787, 788.

"Where a statute is expressed in general terms and in words of the present tense, it will, as a general rule, be construed to apply not only to things and conditions exist-

ing at its passage, but will also be given a prospective interpretation by which it will apply to such as come into existence thereafter:" 36 Cyc. 1235.

A general law may, and frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but so long as it is expressed in general language the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come with its terms and its general purpose and policy. Hence statutes framed in general terms apply to new cases that arise, and to new subjects that are created, from time to time, and which come within their general scope and policy. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope coming into existence subsequent to their passage. Thus, an automobile may come within the provisions of an act relating to vehicles generally, although the statute was passed before the invention of automobiles; and an act passed before moving pictures came into vogue to prohibit the opening of places of public amusement on Sunday may be applied to moving picture shows if the terms of the statute are broad enough to embrace such places of amusement. 25 R. C. L., 778, and cases therein cited.

[fol. 20] We find President Judge Frazer, in Commonwealth vs. Hawkins, 14 Pa. District Reports, 592, applied the foregoing principles in construing the Acts of 1868 and 1901, authorizing cities to impose a license fee on wagons, carts, cars, drays, coaches, omnibuses and every other description of carriages. The City of Pittsburgh enacted an ordinance under authority of said acts imposing a license fee upon the several conveyances mentioned therein. The contention of the defendant in the instant case is that inasmuch as corporations authorized to conduct the business of transporting passengers and baggage by taxicabs and automobiles were not mentioned in Section 23 of the said Act of 1889 now under consideration, and because taxicabs were unknown at the time the Act of 1889 was passed, it would necessarily follow that the defendant corporation

was not taxable under the provisions of the said section of said act. A similar objection was raised in Commonwealth vs. Hawkins. We quote from the opinion of Judge Frazer, over ruling this contention:

"That they were unknown when the Act of 1868 was passed, is not material. If they are carriages 'of any description,' the city has the right to regulate and license them, as we find nothing in the act limiting the power of the municipality to the different classes of vehicles at that time in general use. An automobile being essentially a carriage, we know of no reason why such vehicles should be exempt from license and regulation when other 'carriages' are subject to the same."

A similar question was under consideration by the Supreme Court of the United States in Newman vs. Arthur, 109 U. S. 132, 27 L. Ed. 883. In that case the contention of the plaintiff in error was that the goods in question were not embraced in the provisions of the statute applicable to manufacturers of cotton, described and classed by the number of threads to the square inch, because that description had reference only to goods so described and classed by mercantile usage in dealings between buyers and sellers, where the threads could be counted by the aid of a glass, whereas, the goods in question, were not dealt in by manufacturers and merchants according to any such usage, and could not be, because the threads in a square inch could not be counted, except by unraveling the fabric for that purpose, and it was argued that the goods in question were of a new manufacture, not known at the date of the [fol. 20] passage of the Act, therefore they could not be considered as within the specified enumeration of the statute. Answering this contention the Supreme Court said:

"The fact that, at the date of the passage of the Act, goods of the kind in question had not been manufactured, cannot withdraw them from the class to which they belong, as described in the statute, where, as in the present case, the language fairly and clearly includes them."

Applying the foregoing principles to Section 23 of the Act of 1889, the question naturally arises, does a corpora-

tion with the charter powers of the defendant, and engaged in such business as that of the defendant, fall within the language of said act." The language of Section 23 is—

"* * * every * * * company * * * now or hereafter incorporated or organized * * * owning, operating or leasing * * * any railroad, pipe line, slack water navigation, street passenger railway, canal, or other device for the transportation of freight or passengers or oil,"

shall pay the tax provided by said Section of the Act of 1889.

Device is defined to be the act or power of devising; invention, contrivance. It implies ingenuity or cleverness of invention, skill or dexterity in the adoption of a means to an end; utility for a given purpose. Webster's New International Dictionary. It is perfectly apparent that the legislature, after enabling in Section 23 of the Act the then known devices for the transportation of freight or passengers, added the phrase "or other device for the transportation of freight or passengers or oil" so as to include any device or contrivance which might thereafter be adopted or invented for that purpose.

In Columbia Conduit Co. vs. Commonwealth, 80 Pa. 397, it was held that

"A corporation engaged in the removal of petroleum from place to place by means of pipes is a transportation company within the meaning of the 4th section of the Act of April 24, 1874 and the 5th section of the Act of March 20th, 1877, and is subject to tax imposed by said acts."

The Act of 1874 requires transportation companies to pay annually a tax under section 4, which provides, inter alia

"That every * * * transportation company * * * and every other company * * * owning, operating or leasing * * * any railroad, canal, slack water navigation or street passenger railway or device for the transport of freight or passengers or in any way engaged in the transportation of freight or passengers"

[fol. 22] shall be subject to pay a tax. The 5th section of the act of March 20, 1877, P. L. 5, provides that all com-

panies mentioned in the act of April 24, 1874 section 4, shall pay annually a tax of eight tenths of one per cent upon the gross receipts. This case was tried by President Judge Pearson of this court without a jury, from whose opinion we quote—see page 308:

"The statute, after enumerating various other companies, speaks of 'transportation companies', 'and every other company now or hereafter incorporated by or under any law of this commonwealth', and after providing for other companies incorporated by other states, doing business here, goes on to say, 'or device for the transportation of freight or passengers, or in any way engaged in the transportation of freight or passengers, shall be subject to and pay a tax.'" * * *

"It is conceded in the argument that the principal, and, probably, all of the business of the company, is in flowing petroleum or oil from place to place, mentioned in the charter of incorporation, by means of pipes, through which the oil or petroleum flows, or is pumped, and is thus moved by flowing or pumping, according to the character of the grade from the oil wells to the place of manufacture, and, probably, the prepared oil from thence to the points on the railroad for shipment. It is contended that this moving of petroleum by means of pipes, is not 'transporting', and, therefore, that this is not a transportation company."

After quoting the definition of "transport" from Webster, Judge Pearson goes on to say—see page 309:

"* * * We must construe words, not according to their original etymology, but by the common parlance of the country. * * *

"Again, this 4th section of the Act of 1874, in speaking of the companies to be taxed, also says, after enumerating certain kinds of companies, 'or device for the transportation of freight or passengers, or in any way engaged in the transportation of freight or passengers.' Under this language we cannot doubt that this is a company engaged in the transportation of freight, within the Act of Assembly."

Upon appeal the judgment of this court was affirmed by the Supreme Court. This decision makes it clear that the

words "other device for the transportation of freight or passengers" as found in Section 23 of the Act, are intended to reach any other method than that in use by the corporations already specified in the section. The words "pipe line company" and "conduit company" were not used in the sections of the Acts of 1874 and 1877 from which we have quoted; they are used in Section 7 of the Act of 1879, P. L. 112, which was enacted after the decision of the Supreme Court in the Columbia Conduit Company case, which decision was filed June 2, 1879. These phrases also appear in Section 23 of the Act of 1889.

The most recent decision bearing upon the tax imposed by Section 23 of the said act was decided by this court in the case of Commonwealth vs. Philadelphia Rapid Transit Company, reported in the advance sheets of the Dauphin County Reporter, Volume 28, page 240, which arose upon appeal from a settlement of tax on gross receipts of the defendant corporation made by the Auditor General and approved by the State Treasurer. The defendant was a domestic corporation incorporated for the purpose of construction and operation of motors and cables, or other machinery for supplying motive power to passenger railways and the necessary apparatus for applying the same. In discussing the act it was said by President Judge Hargest that the appellant company was neither a railroad nor a street passenger railway company, its power was limited to leasing and operating railways. The appellant denied that it was a transportation company but admitted that it was within the language of "every other company" which refers to companies of a character similar to those enumerated in the statute. The court Held:

". . . The statute imposes tax upon the receipts obtained by 'owning, operating or leasing to or from another corporation' any street passenger railway. If a company has receipts from the transportation of passengers on a street passenger railway which it owns, it is clearly subject to gross receipts tax. So if any company 'operates' and obtains receipts it is subject to tax upon the gross receipts of the leased line. It is admitted that the appellant company is operating. The statute does not couple the operation with actual ownership or lease. 'Owning', 'operating', 'leasing' are all disjunctive, and the

operation need not be connected with ownership or leasing in order to bring the gross receipts from operation within the terms of the statute. The language is 'operating or leasing', not 'operating and leasing'. * * * The evident purpose of the statute was to impose the tax upon the gross receipts obtained from the business done by all companies of the character enumerated therein, 'doing business in this commonwealth', and the words 'owning, operating or leasing to or from another corporation' were inserted with the intent, and for the purpose, of covering the various phases of 'doing business.'"

We therefore hold that a motor power company, though such kind of company is not specifically named in the act, was a company within the scope of the language of the statute irrespective of whether it was "operating its own line, [fol. 24] operated under a lease, or operated in some other way." If in fact it is "operated" and has "receipts" from that source, it is subject to a tax upon its gross receipts.

Applying the principles announced in the decisions from which we have quoted, we think it is clear that the defendant corporation falls not only within the phrase "transportation company," but also within the language "every other company * * * now or hereafter incorporated or organized * * * and doing business in this commonwealth and owning, operating or leasing to or from another corporation, company * * * any railroad, pipe line, * * * or other device for the transportation of freight or passengers * * *" as such phrases are used in said Section 23 of the Act of 1889, and is, therefore, subject to its provisions and the tax imposed thereby.

The constitutionality of Section 23 of the Act of 1889, if found to apply to the defendant, is questioned. Section 23 of the Act of 1889 does not violate Section 1 of Article IX of the Constitution of Pennsylvania, nor Section 1 of the 14th Amendment to the Constitution of the United States on the ground that the legislature was without constitutional authority to impose the gross receipts tax upon corporate taxicab operators, and not upon unincorporated taxicab operators. It has been settled that the legislature can, without making the revenue statute obnoxious to the

constitution, classify corporations for purposes of taxation, may sever a small class from a larger one; might subject one class to taxation, and leave others untaxed: Commonwealth vs. Brewing Co., 145 Pa. 85, and the cases there cited. And in Commonwealth vs. Delaware Division Canal Co., 123 Pa. 506, it was decided that "a different basis of taxation might be adopted on mortgages and loans held by individuals, and those held by corporations": Commonwealth vs. Sharon Coal Co., 164 Pa. 304; Bell's Gap Railroad Co. vs. Commonwealth of Penna., 134 U. S. 232, 33 L. Ed. 892 894; American Sugar Refining Co. vs. Louisiana, 179 U. S. 89, 45 L. Ed. 102 104.

The testimony offered by the defendant to show that no effort was made to tax individuals or partnerships did not [fol. 25] establish the fact intended to be proved.

We have studied with great care the thorough and very carefully prepared brief of counsel for the defendants and the brief submitted by Messrs. Stonecipher and Robinson as Amici Curiæ. After reviewing the tax legislation prior to the passage of the Act of 1889, counsel for the defendant reached the conclusion that the history of the said legislation shows that the legislature itself never relied on the phrase "every other company * * * owning, operating or leasing * * * any * * * other device for the transportation of freight or passengers," as authority for the imposing of the said tax on a new form of common carrier, because it always included the new form of carrier by specific designation. After carefully considering the case of Commonwealth vs. Columbia Conduit Co., supra, we are not able to reach this conclusion. In that case this court held, affirmed by the Supreme Court, that a conduit or pipe line company was not only a "transportation company" but it was also a company operating a "device for the transportation of freight," as such phrases were used in the said above quoted sections of the Acts of 1874 and 1879. Neither of said acts contain the phrase "conduit company" or "pipe line company," and as we have heretofore observed, this decision antedated the Act of June 7, 1879, in which said phrases were added. Contrary to the defendant's contention and conclusion, these specific designations were not inserted in reenacting legislation until after the Supreme Court had held such specific com-

panies subject to the tax under the general designation of "transportation companies and companies operating a 'device for the transportation of freight.'"

Furthermore, Monongahela Navigation Co. vs. Commonwealth, 66 Pa. 81, decided that the defendant company, which was authorized to make slack water navigation and was prohibited from engaging in transportation, was, nevertheless, liable under the 7th and 8th sections of the Act of May 1, 1868, for a tax on gross receipts. Quoting from the opinion of Mr. Justice Agnew—see page 83—it was said:

[fol. 26] "The seventh section makes this company liable on the tonnage carried over its works notwithstanding it is not a 'transporation company' and all the transportation over its works is done by others. * * * The intent of the legislature being clear to make this company liable for a tax on transportation, the fact that it is not itself a carrier is immaterial. * * * In immediate and juxtaposition is the 8th section whose purpose it is to tax gross receipts only, a subject disconnected from the kind of business performed by the corporation, and whether its receipts be derived from tolls, or freight, or both. The section begins with the declaration, 'That in addition to the taxes provided for as aforesaid, every railroad, canal and transportation company liable to a tax on tonnage under the preceding section of this act, shall pay to the commonwealth a tax, etc.' on gross receipts. Now the preceding section (the 7th) had not used the phrase "transportation company," but had simply designated some companies by name, and designated others as companies upon whose works freight might be transported, as the means of bringing all under a liability for the tonnage carried over their works, whether carriers themselves or not. When the phrase "transportation companies" was used in the 8th section, it is evident it was a nomen collectivum to embrace all the companies described in the 7th section beside railroad and canal companies, made liable to a tax on tonnage under the preceding sections," and it was therefore intended to embrace all the steamboat, slackwater navigation and other companies "upon whose works freight may be transported." * * * Besides these, there are no other known companies owning or using works for the transportation of freight, except rail

road and canal companies, which are expressly named in 8th section; unless therefore we apply the general term "transportation companies" to the steamboat and slack water navigation companies, there seems to be no other known company made liable to the tax on tonnage in the 7th section, to which the phrase can apply."

The above decision disposes of the contentions urged by the learned counsel for the defendant on pages 5 to 8 of their brief, and expressly negatives the contention of the defendant that the phrase "transportation company" as used in various acts of assembly had a fixed and definite meaning, to wit, a company which owned the cars which were conveyed over the railroads.

We do not predicate anything on the failure of the Auditor General to tax the defendant and other similar corporations prior to 1923. He may have been in doubt about the matter. In any event the mistakes or misapprehensions of the accounting officers would not prejudice the commonwealth: Delaware Division Canal Co. vs. Commonwealth, 50 Pa. 399-408; Easton Bank vs. the Commonwealth, 10 Pa. 443. In the Easton Bank case it was held:

[fol. 27] "The omission of the accounting officers to set the was held to be no relinquishment of the claim, under a new statute, mistakenly supposed not to be in force for two years after it really was in force. The receipt of the tax under the former law for these two years, was held not to bar the Commonwealth from going back ten years and more, and settling anew the accounts of the omitted tax." (Quoted in Delaware Division Canal Co. vs. Commonwealth, supra, page 408).

The defendant further offered to prove that in the legislative session of 1923 the then Auditor General prepared a bill to amend Section 23 of the Act of June 1, 1889, P. L. 420, which amendment included specifically taxicab company, auto-bus line company and truck transportation company and every individual partnership, firm or unincorporated association engaged in or hereafter engaged in the transportation of freight or passengers, and that such proposed act was defeated. We think this evidence was pertinent and admissible, but it is reasonable to suppose that

said proposed legislation was introduced to remove any doubt which the accounting officers of the commonwealth may have entertained. The Legislative Journal of the House was submitted, showing the proceedings therein with reference to this proposed amendment.

Defendant also offered to prove that the Pennsylvania Tax Commission created by the Joint Legislation Resolution of June 14, 1923, P. L. 750, reported to the 1925 session of the Legislature that the Gross Receipts Tax did not include taxicab companies, etc., and recommended a bill to amend said Act of 1889 so as to include specifically among other utilities the same language hereinbefore set forth, and that a bill was prepared and recommended by the said Commission and introduced into the House of Representatives in the session of 1925, which bill was passed by the House of Representatives, but was amended in the Senate so as to eliminate therefrom any reference to a tax upon a taxicab company, auto bus line company, truck transportation company, to which amendments the House refused to concur, and as a result thereof a conference committee was appointed, the report of which committee shows that all reference to a tax on taxicabs, etc., and individuals or firms engaged in the transportation of passengers was eliminated from the bill, and that the bill, as amended by the committee [fol. 28] on conference, was finally passed and approved by the Governor. The purpose of these offers was to show that the Legislature at two separate sessions refused to adopt the recommendation of the Auditor General and the Tax Commission; also for the purpose of showing that the Act of 1925 and the Act of 1889 are in pari materia, and that no construction can be placed upon said Act of 1889 to include a class of subjects which the Legislature has twice refused to include in the amended act.

We think that what a tax commission gave as its opinion as to the meaning of the Act of 1889 does not have any bearing upon the intent and purpose of the Legislature of 1889 which passed the act now under discussion. The intent of the act is to be determined by the language of the act itself: Commonwealth vs. Monongahela Navigation Co., 66 Pa. 81. It is not clear to us that the proceedings of the sessions of the Legislature of 1923 and 1925, and the statements of the members of the Legislature and the debates

thereon upon proposed amendments to the Act of 1889 are relevant in determining the intent of the Legislature of 1889 when it enacted the said Act of June 1st, of that year. Even if what Mr. Woner said in the House of Representatives of 1923 as to the opinion of the then Auditor General is correct, such opinion would not be relevant in this case. Delaware Division Canal Co. vs. Commonwealth, supra. The opinion of the Auditor General in the instant case is established by his settlement of the tax against the defendant company, which settlement is the basis of this appeal. The rule as to the extent of consideration to be given to legislative records and debates is set forth in the recent decision of the Supreme Court in Miles' Estate, 272 Pa. 229, 239, where it is held:

"While it is well settled that courts may not resort to views expressed by those who either draft or enact laws, for the purpose of determining the meaning of the words employed therein (see opinion of the court below in Com. v. Mathues, 210 Pa. 272, 282, and authorities there cited), yet in order to get at the old law, the mischief and the remedy, and properly to understand and construe a statute embodying the latter, the history of the enactment in question may always be considered; and when the statute under consideration is a general revision, 'the law as therein written will be deemed to be the same as it stood prior to the revision, unless we find from the statute itself, or its history, a clear intention to change it.'"

[fol. 29] The United States Supreme Court has recently decided in Duplex Printing Press Co. vs. Deering, 254 U. S. 443 that "the report of a committee, having a bill in charge during its passage, 'may be regarded (judicially) as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure.' But it is not necessary to express our view on this point or resort to such an expedient in the case at bar, for, as already shown, when the history of the legislation and all cognate parts of the present act are considered together, the meaning of the statute becomes reasonably clear." See also Russet et al. vs. Snyder et al., 27 Dauphin County Reports, 231; Southwark Bank vs. Commonwealth, 26 Pa. 446, 450; and Bank of Pennsylvania vs. Commonwealth, 19 Pa. 144, 156, wherein it was

held the court will not look to what occurred when the act was passing through the legislature, such evidence being not only of no value, but it is delusive and dangerous.

It is apparent that the rule established in Miles' Estate relates solely to the history of the legislation we now have under discussion, and not to opinions expressed by commissions or members of the legislature having subsequent acts of assembly under consideration. It may well be that the legislatures of 1923 and 1925 regarded the Act of 1889 as sufficiently comprehensive to cover automobiles and taxicab companies for the reasons set forth in the opinions from which we have quoted.

We think nothing can be predicated upon the testimony and offers of testimony produced by the defendant and such testimony is therefore excluded from our consideration.

It is further contended by counsel appearing Amici Curiae that the defendant was not subject to the provision of Section 23 of the Act of 1889 and the tax imposed thereby for the reason that it was subject to the tax imposed by Section 14 of said act, which was amended by the Act of June 8, 1891, P. L. 229, and which was repealed by the Act of June 17, 1913, P. L. 507, which latter act imposed a tax in Section 1 thereof. Said counsel contends that "taxicabs" fall within the term "hacks" and "cabs", used in said section, and that the Pittsburgh companies paid such tax.

[fol. 30] It nowhere appears that the defendant in the instant case pays the tax provided for in Section 1 of the Act of 1913, nor does said Act have any bearing on the matter now under discussion. The imposition of the Tax provided for by Section 14 did not relieve from the tax imposed by Section 23. Section 14 of the Act of 1889 imposed a tax at the rate of "three mills upon each and every dollar" of the value of the "hacks" and "cabs." Section 1 of the Act of June 17, 1913, did not change the subject of taxation, it merely changed the rate of taxation from three mills to four mills; the tax imposed by Section 23 is "upon the gross receipts * * * received from passengers and freight traffic transported wholly within this state." The subject of taxation in these two sections of the Act are not the same and there is no double taxation. Commonwealth vs. Harrisburg Light & Power Co., 284 Pa. 175, in which it was held

that an electric light company which pays the gross receipts tax levied by Section 23 of the Act of June 1, 1889, P. L. 420, is also liable to pay the mercantile license tax levied by the Act of May 2, 1899, P. L. 184, on the gross receipts from the sale of electric appliances. Such taxes do not involve double taxation. The gross receipts tax is a general revenue measure while the mercantile tax is a license tax for the privilege of vending merchandise. The two taxes are not levied on the same property for the same purpose. The legislature has power to impose double taxation but the intention to do so must be clear and is not to be implied.

Slightly paraphrasing the language of the Supreme Court in the case from which we have just quoted, we hold the gross receipts tax is a general revenue measure while Section 1 of the Act of 1913 imposes a tax at the rate of four mills on the value of property taxed for county and local purposes. The two taxes are not levied on the same property for the same purpose. The legislature has power to impose double taxation and in the instant case the intention to do so is clear and is not implied.

We find nothing in the numerous authorities cited by the defendant, all of which we have studied and given our careful consideration, which moves us to reach a different conclusion from that expressed in this opinion.

[fol 31] Governed by the principles deducible from the authorities quoted in this discussion, we find the following—

Conclusions of Law

1. The defendant is a transportation company engaged in the transportation of passengers and baggage wholly within the state, and is also a company operating devices for such transportation.

2. The defendant is a corporation contemplated by Section 23 of the Act of June 1, 1889, P. L. 420, and is subject to the payment of the gross receipts tax imposed by said section said act.

Judgment

Gross receipts tax for the six months ending the 31st day of December, 1923	$5,197 88
Interest from May 2, 1924, being sixty days after settlement	563 97
Total	5,761 85
Attorney General's commission of five per cent	288 09
Total	$6,049 94

Judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant for the said sum of Six Thousand Forty nine Dollars and Ninety four Cents ($6,049.94), unless exceptions be filed within the time limited by law.

Frank B. Wickersham, A. L. Judge.

[fol. 32] [File endorsement omitted.]

[fol. 33] In Supreme Court of Pennsylvania, Middle District

2431

No. 24, May Term 1926

Commonwealth of Pennsylvania

vs.

Quaker City Cab Company, Appellant

Assignments of Error. Filed April 22, 1926

1. The learned Court erred in overruling Defendant's First Exception which reads as follows:

"1. The learned Court erred in directing the following judgment to be entered:

'Judgment is hereby directed to be entered in favor of the Commonwealth and against the defendant for the said sum of Six Thousand Forty Nine Dollars and Ninety Four

Cents ($6,949.94), unless exceptions be filed within the time limited by law.' "

2. The learned Court erred in overruling Defendant's Second Exception which reads as follows:

"2. The learned Court erred in holding:

'When interpreting this act of assembly certain fundamental rules must be borne in mind:

(1) "The first rule of interpreting statutes requires us to seek the legislative intent in the language of the law itself." Commonwealth v. Monongahela Navigation Co., 66 Pa. 81.

(2) "It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation." 12 C. L., Vol 25, page 787, 788.

"Where a statute is expressed in general terms and in words of the present tense, it will, as a general rule, be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation by which it will apply to such as come into existence thereafter." 36 Cyc. 1255.

'A general law may, and frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but so long as it is expressed in general language the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms and its general purpose and policy. Hence statutes framed in general terms apply to new cases that arise and to new subjects that are created, from time to time, and which come within their general scope and policy. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope coming into existence subsequent to their passage. Thus, an automobile may come within the provisions of an act relating to vehicles generally, although the statute was passed before the invention of automobiles; and an act passed before moving pictures came into vogue to prohibit the opening of places of public

amusement on Sunday may be applied to moving picture shows if the terms of the statute are board enough to embrace such places of amusement: 25 R. C. L., 778, and cases therein cited.'"

3. The learned Court erred in overruling Defendant's Third Exception which reads as follows:

[fol. 55] "3. The learned Court erred in holding:

'Applying the foregoing principles to Section 23 of the Act of 1889, the question naturally arises, does a corporation with the charter powers of the defendant, and engaged in such business as that of the defendant, fall within the language of said act?'"

4. The learned Court erred in overruling Defendant's Fourth Exception which reads as follows:

"4. The learned Court erred in holding:

'It is perfectly apparent that the legislature, after including in Section 23 of the Act the then known devices for the transportation of freight or passengers, added the phrase "or other device for the transportation of freight or passengers or oil" so as to include any device or contrivance which might thereafter be adopted or invented for that purpose.'"

5. The learned Court erred in overruling Defendant's Fifth Exception which reads as follows:

"5. The learned Court erred in holding:

'This decision makes it clear that the words "other device for the transportation of freight or passengers" as found in Section 23 of the Act, are intended to reach any other method than that in use by the corporations already specified in the section.'"

6. The learned Court erred in overruling Defendant's Sixth Exception which reads as follows:

[fol. 56] "6. The learned Court erred in holding:

'Applying the principles announced in the decisions from which we have quoted, we think it is clear that the defendant corporation falls not only within the phrase "trans-

portation company," but also within the language "every other company" * * * now or hereafter incorporated or organized * * * and doing business in this commonwealth and owning, operating or leasing to or from another corporation, company * * * any railroad, pipe line, * * * or other device for the transportation of freight or passengers * * *" as such phrases are used in said Section 23 of the Act of 1889, and is, therefore, subject to its provisions and the tax imposed thereby.'"

7. The learned Court erred in overruling Defendant's Seventh Exception which reads as follows:

"7. The learned Court erred in holding:

'Section 23 of the Act of 1889 does not violate Section 1 of Article IX of the Constitution of Pennsylvania, nor Section 1 of the 14th Amendment to the Constitution of the United States on the ground that the Legislature was without constitutional authority to impose the gross receipts tax upon corporate taxicab operators, and not upon unincorporated taxicab operators. It has been settled that the legislature can, without making the revenue statute obnoxious to the constitution, classify corporations for the purposes of taxation; may sever a small class from a larger [fol. 37] one; might subject one class to taxation, and leave others untaxed.'"

8. The learned Court erred in overruling Defendant's Eighth Exception which reads as follows:

"8. The learned Court erred in holding:

'The testimony offered by the defendant to show that no effort was made to tax individuals or partnerships did not establish the fact intended to be proved.'"

9. The learned Court erred in overruling Defendant's Ninth Exception which reads as follows:

"9. The learned Court erred in holding:

'The above decision disposes of the contentions urged by the learned counsel for the defendant on pages 5 to 8 of their brief, and expressly negatives the contention of the defendant that the phrase "transportation company" as

used in the various acts of a assembly had a fixed and definite meaning to wit, a company which owned the cars which were conveyed over the railroads.'"

10. The learned Court erred in overruling Defendant's Tenth Exception which reads as follows:

"10. The learned Court erred in holding:

'We do not predicate anything on the failure of the Auditor General to tax the defendant and other similar corporations prior to 1923. He may have been in doubt [fol. 38] about the matter. In any event the mistakes or misapprehensions of the accounting officers would not prejudice the commonwealth.'"

11. The learned Court erred in overruling Defendant's Eleventh Exception which reads as follows:

"11. The learned Court erred in holding:

'We think that what a tax commission gave as its opinion as to the meaning of the Act of 1889 does not have any bearing upon the intent and purpose of the Legislature of 1889 which passed the act now under discussion. The intent of the act is to be determined by the language of the act itself.' Commonwealth vs. Monongahela Navigation Co., 66 Pa. 81. It is not clear to us that the proceedings of the sessions of the Legislature of 1923 and 1925, and the statements of the members of the Legislature and the debates thereon upon proposed amendments to the Act of 1889 are relevant in determining the intent of the Legislature of 1889 when it enacted the said Act of June 1st, of that year. Even if what Mr. Woner said in the House of Representatives of 1923 as to the opinion of the then Auditor General is correct, such opinion would not be relevant in this case: Delaware Division Canal Co. vs. Commonwealth, supra. The opinion of the Auditor General in the instant case is established by this settlement of the tax against the defendant company, which settlement is the basis of this appeal.'"

[fol. 39] 12. The learned Court erred in overruling Defendant's Twelfth Exception which reads as follows:

"12. The learned Court erred in holding:

'We think nothing can be predicated upon the testimony and offers of testimony produced by the defendant and such testimony is therefore excluded from our consideration.'"

13. The learned Court erred in overruling Defendant's Thirteenth Exception, which reads as follows:

"13. The learned Court erred in holding:

'It nowhere appears that the defendant in the instant case pays the tax provided for in Section 1 of the Act of 1913, nor does said Act have any bearing on the matter now under discussion. The imposition of the tax provided for by Section 14 did not relieve from the tax imposed by Section 23.'"

14. The learned Court erred in overruling Defendant's Fourteenth Exception which reads as follows:

"14. The learned Court erred in the following conclusion of law:

'1. The defendant is a transportation company engaged in the transportation of passengers and baggage wholly within the state, and is also a company operating devices for such transportation.'"

15. The learned Court erred in overruling Defendant's Fifteenth Exception which reads as follows:

"15. The learned Court erred in the following conclusion of law:

[fol. 40] '2. The defendant is a corporation contemplated by Section 23 of the Act of June 1, 1889, P. L. 420, and is subject to the payment of the gross receipts tax imposed by said section of said act.'"

16. The learned Court erred in overruling Defendant's Sixteenth Exception which reads as follows:

"16. The learned Court erred in not finding as a fact that in 1889 when Section 23 of the Act of June 1, 1889, P. L. 420 was enacted the automobile industry was in its

infancy; that taxicabs were unknown and not operated at that time; and that taxicabs were not operated until about 1865."

17. The learned Court erred in overruling Defendant's Seventeenth Exception which reads as follows:

"17. The learned Court erred in not directing judgment to be entered in favor of Defendant and against the Commonwealth."

18. The learned Court erred in entering the following order overruling all of Defendant's Exceptions and directing judgment to be entered in favor of the Commonwealth and against Defendant:

"And now, March 9th, 1926, the above exceptions are overruled and judgment is directed to be entered in favor of the Commonwealth and against the defendant as heretofore ordered.

By the Court,

Francis B. Wickersham, A. L. J."

[fol. 41] Douglass D. Storey, Attorney for Defendant-Appellant. Humbert B. Powell, Philadelphia, Pa. Hause, Evans & Baker, Harrisburg, Pa.

[fol. 42] [File endorsement omitted.]

[fol. 43]

188

IN SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

[Title omitted]

OPINION—Filed June 28, 1926.

WARREN, J.:

In 1917, the Pennsylvania Public Service Commission granted the defendant, Quaker City Cab Company, a New Jersey corporation, a certificate of public convenience, since which time it has been engaged in carrying passen-

[fol. 44]

gers and their luggage for hire in the city of Philadelphia, where it operates some three hundred and twenty five taxi cabs and fifty limousines and touring cars. Each cab and car is propelled by its own power and operated on the city streets by a driver; the amount of fare is regulated by the distance traveled or time consumed. They have no fixed termini but some fifty stands throughout the city where they can be found or called by telephone; they also pick up passengers anywhere. The taxicab is the outgrowth of the automobile and came into general use about 1905, gradually superseding hacks and bus lines. Early in 1924 the auditor general, approved by the state treasurer, settled and assessed a tax against defendant of eight mills on the dollar of its gross income, inter alia, for the six months ending December 31, 1923. Defendant appealed therefrom to the court of common pleas of Dauphin county where by agreement the case was heard by the court without a jury, and the tax sustained in a [illegible] opinion, reported in 29 Dauphin [illegible]. Thereupon defendant brought this appeal.

[fol 44] The tax was properly assessed under section 2 of the Act of June 1, 1889, P. L. 420, 441, which provides inter alia, "That every railroad company, pipe line company, pendant company, steam heat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint stock association or limited partnership now or hereafter incorporated or organized by or under any law of this Commonwealth or any other state [illegible] and doing [illegible] in this Commonwealth and owning, operating or leasing [illegible] from another corporation, company, association, joint stock association or limited partnership any railroad, pipe line, canal, slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or [illegible] shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross income of said corporation, company or association, limited partnership, firm or co-partnership, received from passengers and freight traffic transported wholly within this state.

A statute should be construed primarily by its language and the legislature is presumed to have used words in their ordinary signification: Boyle v. Philadelphia and Reading Railroad Co., 54 Pa. 311. Here the language is plain. True, taxicab companies are not mentioned, for the obvious reason that in 1880 there were none. But the statute is prospective and expressed in broad language so as to embrace such companies when formed and operated as common carriers. "A general law may, and frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but so long as it is expressed in general language the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms and its general purpose and policy. Hence statutes framed in general terms apply to new cases that arise, and to new subjects that are created, from time to time, and which come within their general scope and policy. [fol. 45] It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope coming into existence subsequent to their passage. Thus, an automobile may come within the provisions of an act relating to vehicles generally, although the statute was passed before the invention of automobiles; and an act passed before moving pictures came into vogue to prohibit the opening of places of amusement on Sunday may be applied to moving picture shows if the terms of the statute are broad enough to embrace such places of amusement." 25 R. C. L. p. 778. The express provisions of the statute in question lead to this conclusion. It mentions transportation companies and we, having held in Columbia Conduit Co. v. Com., 98 Pa. 307, that under similar prior statutes a pipe line company carrying oil was a transportation company, it is difficult to see why a taxicab company transporting passengers is not. The case just cited answers appellant's contention that the words "transportation company" refer merely to a company carrying freight or passengers over the lines or facilities of another company, and see Monongahela Navigation Co. v. Com., 66 Pa. 81. Again the words

"and every other company" following the designation, inter alia, of "street passenger railway company" operating any railroad, etc., or other device for the transportation of freight or passengers or oil, shall pay the state treasurer, etc., clearly embrace a taxicab company, which is a company using certain devices, to wit, motor cars and public streets, for the transportation of passengers. The real subject of the tax is the gross receipts of a company engaged in the transportation of freight or passengers and to hold that the transportation must be on definite tracks and between fixed termini would tend to thwart the manifest purpose of the statute; and that it includes steamboats negatives the contention that it applies only to a carriage upon tracks or between fixed termini. It is difficult to suggest a reason why a railway or street car company transporting passengers from one [fol. 46] part of Philadelphia to another should bear a burden from which a taxicab company performing a like service is exempt.

We have considered the contention so earnestly urged that the general words "every other company" should be taken with reference to the preceding particular language and be confined to companies of like character, under the rules of ejusdem generis. The rule, as a general proposition, is sound, but a taxicab is not of a nature so substantially different from the instrumentalities expressly mentioned as to be excluded therefrom. For example, a street car and a taxicab each carries passengers for hire, each uses the public streets and whether the motive power is gasoline or electricity, or whether it travels on a fixed track or on the general pavement is not of controlling importance; both are devices for the accomplishment of the same end. In Commonwealth v. Hawkins, 14 District Reports 262, Mr. Justice Frazer, then President Judge of the courts of Allegheny county, construing a statute authorizing the municipality to impose a license fee on wagons, carts, cars, drays, coaches, omnibuses and every other description of carriages, held it included automobiles, although unknown when the statute was enacted. In the course of the opinion he says: "That these automobiles were unknown when the Act of 1868 was passed, is not material. If they are carriages 'of any description,' the

city has the right to regulate and license them, as we find nothing in the act limiting the power of the municipality to the different classes of vehicles at that time in general use. An automobile being essentially a carriage, we know of no reason why such vehicles should be exempt from license and regulation when other 'carriages' are subject to the same." To like import is Newman v. Arthur, 196 U. S. 132, 27 L. Ed. 883, where the court says, inter alia: "The fact that, at the date of the passage of the Act, goods of the kind in question had not been manufactured, cannot withdraw them from the class to which they belong, as described in the statute, where, as in the present case the language fairly and clearly includes them."

That for eighteen years after the advent of taxicab com- [fol. 47] panies taxes were not assessed against them under the act in question is an administrative construction favorable to defendant, but cannot prevail against the plain language of the statute. The state cannot be prejudiced by the neglect of its officers to settle and assess a tax: Delaware Division Canal Co. v. Com., 50 Pa. 399. Moreover, contemporary interpretation may make plain that which is doubtful but cannot make doubtful that which is plain. See Penna. R. R. Co. v. International Coal Co., 230 U. S. 184. Where the language is doubtful such interpretation may be resorted to (see Com. v. Paine, 207 Pa. 45; Com. v. Mantz et al., 168 Pa. 290), but not where it is unequivocal: Newman v. Arthur, supra. That the legislature in 1925 refused to amend the act of 1889 so as to expressly include taxicabs is of no moment, nor is the fact that in 1925 it stated said taxicabs when amending the earlier statute. We are construing the act of 1889, not that of 1925. Statutes, as above stated, must be construed primarily by their language, not by what the members of the legislature said who enacted them (see Bank of Penna. v. The Com., 10 Pa. 144), much less by what members of the legislature said about them thirty-five years later. The history of an enactment, however, may be considered: Myles Estate, 272 Pa. 229; In re Lits' Estate, 129 N. W. (Mich.) 501. That the tax commission in 1925 recommended the enactment of a statute covering gross receipts, gross income, especially naming taxicab companies, is

merely expressive of the thought of that commission and could not influence the auditor general or the courts.

Section 14 of the Act of June 1, 1889, P. L. 426 (changed by subsequent legislation), authorizes the levying of a county tax of three mills on the value thereof on "hacks, cabs and other vehicles used for transporting passengers for hire, except steam and street passenger railway cars." It is, however, of no moment here whether taxicabs fall within the designation of hacks, cabs, etc., for that imposes a local tax on property, while section 23 imposes a state tax on business or income, so it is not double taxation, although such may be imposed by express authority of the [fol. 48] legislature: Com. v. Harrisburg L. & P. Co., 284 Pa. 173.

Appellant contends the statute under which the tax was assessed, as construed by the trial court, is unconstitutional as violative of sec. 1 of article IX of the state constitution, which requires uniformity of taxation on the same class of subjects, and also of sec. 1 of the fourteenth amendment to the federal constitution which provides, inter alia, that no state shall "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The contention is based on the assertion that individuals engaged in a like taxicab business are not subject to the tax, whether they are is not shown and in any event is immaterial, as the right to classify for purposes of taxation is well settled: Schoverling et al. v. Comet Oil & Ref. Co., 284 Pa. 188, 198 and cases there cited. Under this right corporations may be placed in a class separate from individuals and so taxed: Com. v. Sharon Coal Co., 164 Pa. 204; Com. v. Brewing Co., 143 Pa. 81; Com. v. Delaware Div. Canal Co., supra; and see Scalalt v. Commissioners, 187 Pa. 218. It is sufficient if all corporations of like character fall within the statute (see Penna. v. Bridge et al., 261 Pa. 4, 18) and it is uniformity of taxation according to the classification made that is required: Com. v. Del. Div. Canal Co., supra; Com. v. Edgerton Coal Co., Ltd., 164 Pa. 284. The fourteenth amendment to the United States Constitution was not intended to compel the state to adopt any rule of equal taxation: St. Louis S. W. Ry. v. Kansas, 248 U. S. 165, 166; American Sugar Refining Co. v. Louisiana,

179 U. S. 89; Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232; Knisley v. Cotterel, 196 Pa. 614.

It would unduly prolong this opinion to discuss all other legislation, which it is claimed affects the construction of that here in question, or to refer to all the authorities which the industry of able counsel has brought to our attention. We might say, however, that the provision of the Act of June 15, 1911, which we condemned in Schoyer et al. v. Comet Oil Ref. Co., supra, so far as it gave a different [fol. 49] method for the collection of debts due the commonwealth by corporations from those due by individuals, had no reference to classification for purposes of taxation. We find nothing in any of the statutes or authorities cited to create a doubt as to the correctness of the conclusions of the trial court. We have not overlooked the rule that in construing a tax statute the tax payer must receive the benefit of the doubt (Shwab v. Doyle, 258 U. S. 529; Com. v. Pa. W. & P. Co., 271 Pa. 456), but here we have none. As the emergency profits tax, assessed against defendant for 1923, was remitted by the auditor general, it drops out of the case.

The judgment is affirmed.

Opinion filed June 26, 1926.

[fol. 50] File endorsement omitted.]

[fol. 51] In Supreme Court of Pennsylvania, Middle District

[Title omitted]

Petition for Writ of Error. Filed September 4, 1926.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

Quaker City Cab Company, Petitioner, respectfully petitions the Court to grant it a writ of error to the Supreme Court of the United States in the above entitled proceeding, and respectfully represents:

1. The statute the validity of which is drawn in question on the ground that it is repugnant to Section 1 of the 14th Amendment of the Constitution of the United States is Sec-

tion 23 of the Act of 1 June 1889, P. L. 420 (Pa. Stat. 1920, Section 20,488).

2. Petitioner raised this constitutional question before the Auditor General, in its appeal from the settlement of tax to the Court of Common Pleas of Dauphin County, and finally in its appeal to this Court. Petitioner raised this question as the Third of its three questions involved before this Court.

3. The constitutional question so raised is: Does said Section 23 violate the due process of law and the equal protection of the law clauses of Section 1 of the 14th Amendment because it arbitrarily imposes a tax of 8 mills upon the gross receipts of taxicab corporations and does not impose said tax upon the similar gross receipts of their competing individual and general partnership operators?

(fol. 52) 4. This Court, in its opinion filed 28 June 1926, held that said Section did not violate the said provisions of the 14th Amendment and sustained the validity of the Act and the tax imposed thereunder.

5. On 27 July 1926, Petitioner filed a motion for reargument which motion this Court refused on 14 August 1926.

6. Petitioner believes, and therefore avers, that the action of the Legislature in imposing this tax upon the gross receipts of those taxicab operators only who operate as corporations, as joint stock associations or as limited partnerships and in exempting from tax the similar receipts of their competitors who operate as individuals or as general partnerships, is clearly arbitrary and unreasonable and founded upon no reasonable basis of classification.

7. This case is reviewable by the Supreme Court of the United States on a writ of error under Section 237 of the Judicial Code (U. S. Compiled Statutes, 1925, Section 1214) because there was clearly drawn into question, from the beginning of the litigation, the validity of said Section 23 on the ground that as applied to taxicab corporations it was repugnant to said Section 1 of the 14th Amendment to the Constitution, and the decision of this Court was in favor of its validity.

8. Attached hereto is the opinion of this Court filed by Mr. Justice Walling.

9. Petitioner respectfully refers the Court to pages 4 to 10 of its Memorandum Brief (filed on 27 July 1926 to accompany its petition for reargument) for its reasons in support of the allowance of this writ of error.

Wherefore Petitioner respectfully prays that a writ of [fol. 53] error may be allowed and issued to bring before the Supreme Court of the United States for review the judgment of this Court affirming the judgment of the Court of Common Pleas of Dauphin County in favor of the Commonwealth of Pennsylvania and against Petitioner; and that Petitioner have such other and further relief as may be just and according to law.

Quaker City Cab Company, by (S). Douglass D. Storey, Owen J. Roberts, Attorneys.

Receipt of a copy of this petition is hereby acknowleged for the Commonwealth of Pennsylvania, August 25, 1926.

By (S.) George W. Woodruff, Attorney General.

[fol. 54] *Duly sworn to by William Heller. Jurat omitted in printing.*

[fol. 55] In Supreme Court of Pennsylvania

Order Allowing Petition and Fixing Bond

And now this 8th day of September, 1926, upon consideration of the foregoing petition for writ of error, it is hereby ordered that the petition be granted, and that a writ of error issue from the Supreme Court of the United States to the Supreme Court of Pennsylvania, and that the record be certified and transmitted to the Supreme Court of the United States, security to be entered for costs in the amount of one thousand ($1,000) dollars.

By the Court

(S.) Robt. von Moschzisker, Chief Justice.

[Copy of Opinion of Supreme Court of Pennsylvania.]

[fol. 56] [File endorsement omitted.]

[fol. 57] In Supreme Court of Pennsylvania, Middle District, May Term, 1926

No. 24

[Title omitted]

Assignment of Error—Filed September 15, 1926

And now comes Quaker City Cab Company, Plaintiff in Error, by its attorneys, and files the following assignment of error upon which it will rely in its prosecution of the appeal in the above entitled cause from the final judgment entered by the Supreme Court of Pennsylvania on June 28, 1926, and re-affirmed on August 14, 1926:

1. The Supreme Court of Pennsylvania erred in holding that Section 23 of the Act of Assembly of the Commonwealth of Pennsylvania entitled "A further supplement to an Act entitled 'An Act to provide revenue by taxation' approved the seventh day of June, Anno Domini, One Thousand Eight Hundred and Seventy four," approved June 1, 1889, P. L. 420, 431, as applied to Plaintiff in Error, was constitutional and did not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides that:

[fol. 58] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

By reason whereof Plaintiff in Error prays that the said judgment of the Supreme Court of Pennsylvania may be reversed and that Section 23 of said Act of Assembly be held unconstitutional as applied to Plaintiff in Error.

(S.) Douglass D. Storey, Owen J. Roberts, Attorneys for Plaintiff in Error.

[fol. 59] [File endorsement omitted]

[fol. 60] In Supreme Court of Pennsylvania, Middle District

[Title omitted]

Stipulation and Praecipe for Transcript of Record—Filed October 13, 1926

To the Prothonotary of the Supreme Court of Pennsylvania:

Now, this 11th day of October, 1926, Plaintiff in Error and Defendant in Error, by their respective counsel, stipulate that the transcript of the record in the above entitled cause shall consist of the following portions of the record, and request you to prepare said transcript and include therein, in the order given below, the following:

1. Stipulation as to facts and exhibits.
2. Opinion of the Court of Common Pleas of Dauphin County.
3. Assignment of Errors filed in the Supreme Court of Pennsylvania.
4. Opinion of the Supreme Court of Pennsylvania.
[fol. 61] 5. Petition for allowance of a Writ of Error to the Supreme Court of the United States and order made thereon allowing the Writ of Error (omitting the attached copy of the opinion of the Supreme Court of Pennsylvania.)
6. The accompanying Assignment of Errors.
7. Citation on Appeal.
8. Stipulation and Praecipe for Transcript of Record.

Douglass D. Storey, Owen J. Roberts, Solicitors for Plaintiff in Error. George W. Woodruff, Attorney General of the Commonwealth of Pennsylvania.

[fols. 62-73] [File endorsement omitted.]

[fol. 74] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Plaintiff in Error of Parts of the Record to be Printed—Filed October 19, 1926

To the Hon. William R. Stansbury, Clerk of the Supreme Court of the United States:

Sir: Under Rule 11 (9) Plaintiff in Error, by its counsel, files the following statement of the points on which it intends to rely, and of the parts of the record which are necessary for the consideration thereof, together with proof of service upon the Attorney General of the Commonwealth of Pennsylvania:

1. The points on which Plaintiff in Error intends to rely in its argument are:

Section 23 of the Act of Assembly of the Commonwealth of Pennsylvania entitled "A further supplement to an Act entitled 'An Act to provide revenue by taxation' approved the 7th day of June, anno domini one thousand eight hundred and seventy-nine" approved June 1, 1889, P. L. 420, 423, as constructed by the Supreme Court of Pennsylvania in this cause to apply to Plaintiff in Error is unconstitutional and violates Section 1 of the 14th Amendment to the Constitution of the United States, because (1) it deprives Plaintiff-in-Error of its property without due process of [fols. 75 & 76] law, and (2) denies to it the equal protection of the laws.

2. The following parts of the record are necessary for the consideration of the above points:

1. Stipulation as to Facts and Exhibits.

2. Opinion of the Court of Common Pleas of Dauphin County.

3. Assignments of Error filed in the Supreme Court of Pennsylvania.

4. Opinion of the Supreme Court of Pennsylvania.

5. Petition for allowance of a Writ of Error to the Supreme Court of the United States and the order made thereon by the Chief Justice of the Supreme Court of Pennsylvania allowing the Writ of Error.

6. The Accompanying Assignments of Error.
7. Stipulation and Praecipe for Transcript of Record.

Douglass D. Storey, Owen J. Roberts, Solicitors for Plaintiff in Error.

And now, this 18th day of October, 1926, service of the above statement is accepted, and a copy of thereof is acknowledged, for the Commonwealth of Pennsylvania, Defendant-in-Error.

George W. Woodruff, Attorney General of the Commonwealth of Pennsylvania.

[fol. 77] [File endorsement omitted.]

Endorsed on cover: File No. 32,258. Pennsylvania Supreme Court. Term No. 691. Quaker City Cab Company, plaintiff in error, vs. Commonwealth of Pennsylvania. Filed October 14th, 1926. File No. 32,258.

(12)

FILED
MAR 22 1927
CLERK

No. 691.

OCTOBER TERM, 1926.

IN THE

Supreme Court of the United States

QUAKER CITY CAB COMPANY,
Plaintiff-in-Error,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF-IN-ERROR.

DOUGLASS D. STOREY,
OWEN J. ROBERTS,
For Plaintiff-in-Error.

HAYES, EVANS & HARE,
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MORRIS BUILDING,
PHILADELPHIA, PA.,
Of Counsel.

April, 1927.

GIBBS PRESS & GIBBS PRINTING COMPANY, PHILADELPHIA

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I. Reference to the Official Reports of the Opinions Delivered by the Courts Below.

The opinion of the Court of Common Pleas of Dauphin County, delivered by Judge Wickersham (R. 9), is reported in 29 Dauphin County Reports 90.

The opinion of the Supreme Court of Pennsylvania, delivered by Mr. Justice Walling (R. 33), is reported in 287 Pa. 161.

II. The Grounds on which the Jurisdiction of this Court is Invoked.

1. The date of the judgment to be reviewed is 26 June 1926 (R. 39). The date when the motion for reargument was refused is 14 August 1926 (R. 40). The date when the writ of error was allowed is 8 September 1926 (R. 41).

2. In the Court of Common Pleas of Dauphin County, Plaintiff-in-Error claimed that if Section 23 of the Act of 1 June 1889, P. L. 420 (Pa. St. 1920 §20,388) were construed to apply to it, then Section 23 was void as applied to it because the statute took its property without

due process of law and denied to it the equal protection of the laws as guaranteed by Article I of the 14th Amendment to the Constitution of the United States, and was therefore repugnant to said section of the Constitution (R. 19). The Court of Common Pleas denied this claim (R. 20).

In its Assignments of Error filed in the Supreme Court of Pennsylvania, Plaintiff-in-Error reasserted the same claim and assigned the ruling of the lower Court as one of the errors (R. 30). The Supreme Court of Pennsylvania also denied this claim (R. 38).

3. The jurisdiction of this Court is invoked under Section 237a of the Judicial Code, as amended by the Act of Congress approved 13 February 1925, 43 Stat. 936, Chapter 229.

III. Statement of the Case.

This is a writ of error under Section 237a of the Judicial Code to the judgment of the Supreme Court of Pennsylvania, affirming a judgment of the Court of Common Pleas of Dauphin County, Pennsylvania directed by it to be entered against Plaintiff-in-Error (Defendant below) and in favor of Defendant-in-Error (Plaintiff below)

in an appeal to it from a settlement of an account by the Auditor General and State Treasurer for gross receipts taxes under Section 23 of the Act of 1 June 1889, P. L. 420 (Pa. St. 1920, §20,-388) in the amount of $5,197.88 for the 6 months period ending 31 December 1923.

Plaintiff-in-Error is a corporation organized under the laws of New Jersey. On 8 June 1917 it registered with the proper officers to do business in Pennsylvania as a foreign corporation (R. 2).

It was incorporated for the rendition of, and from 8 June 1917, has rendered a general taxicab service in the City of Philadelphia, Pennsylvania (R. 2).

From the date of its registration it filed all the tax reports demanded of it by the Auditor General (R. 2).

In the legislative Session of 1923 the Auditor General had prepared and had introduced into the House of Representatives a bill to amend said Section 23 of the Act of 1889 by specifically including within its provisions taxicab companies, auto-bus line companies and truck transportation companies and every individual, partnership, firm or unincorporated association engaged in or here-

after engaged in the transportation of freight or passengers. This bill was defeated (R. 22).

By letter of 3 January 1924, the Auditor General for the *first time* demanded of Plaintiff-in-Error that it file its several gross receipts reports for each 6 months period from 8 June 1917 to 31 December 1923 (R. 2). Plaintiff-in-Error filed those reports under protest (R. 3). The fiscal officers settled taxes (8 mills on each dollar of gross receipts from the transportation of passengers in Pennsylvania) in the total amount of $57,774.98 against it on the basis of said reports and imposed penalties in the total amount of $5,054.68 for alleged failure to file said reports on time (R. 3, 4).

Plaintiff-in-Error lodged with the Auditor General appeals from all said settlements.

In the legislative Session of 1925, the Pennsylvania State Tax Commission (created by a Joint Resolution of 14 June 1923, P. L. 750) reported to the Legislature that said Section 23 did not impose a tax upon taxicab companies *etc.*, and recommended that the Section be amended to accomplish that purpose. Such recommended bill, which in this respect was similar to the bill introduced in the Session of 1923, was passed by the House. The Senate however amended the bill and eliminated therefrom

the provision specifically imposing the tax upon taxicab companies. The House refused to concur in this amendment. Thereupon a Conference Committee was appointed which not only eliminated the provisions taxing taxicab companies but also eliminated the provisions which would have taxed every individual, partnership, firm or unincorporated association engaged in the transportation of persons. The report was adopted by both branches, and the bill as thus amended was passed and approved, being the Act of 14 May 1925, P. L. 706 (R. 23).

Inasmuch as this was a test case, Plaintiff in-Error and Defendant in-Error prosecuted only the appeal from the settlement for the last 6 months period, namely the period ending 31 December 1923 which involved a tax of $5,197.88 and no penalty (R. 3). The case was submitted to the trial Court without a jury. Most of the facts were stipulated (R. 2). The stipulation contains this fact (R. 5):—

> "The defendant [Plaintiff in Error] is subjected to competition in its business by individual, partnership and unincorporated taxicab operators."

The trial Court and the Supreme Court of Pennsylvania held (1) that Plaintiff in-Error was subject to the terms of said Section 23, and

(2) said Section was constitutional when applied to it, and (3) entered judgment against it.

Upon the refusal of the motion for reargument, the writ of error to review this judgment was allowed by Mr. Chief Justice von Moschzisker of the Supreme Court of Pennsylvania (R. 41).

IV. Specification of Error.

The Supreme Court of Pennsylvania erred in denying the claims of Plaintiff in Error that Section 23 of the Act of 1 June 1889 (when applied to it) violated the due process of law and or the equal protection of the laws clauses of Article I of the 14th Amendment because it arbitrarily imposed a tax of 8 mills upon the gross receipts of *corporate* taxicab operators and did not impose said tax upon the similar gross receipts of their *competing individual* and *general partnership* taxicab operators (R. 44).

V. Argument.

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1. General Statement.

Plaintiff in Error does not contend that under the 14th Amendment the Legislature is prohibited from adopting a reasonable classification for the purpose of taxation.

Plaintiff in Error does contend, however, that in the imposition of a *tax not peculiar* to corporations, the Legislature can not constitutionally impose such a tax upon the gross receipts of only the *corporate* taxicab operators* and exempt their competitors the *non corporate* taxicab operators.* In other words that in such a tax as this, no alleged tax classification can rest solely upon the *character* of the operator (that is, whether it be a *corporate* or *non corporate* operator) when there is no other difference in the situation or the circumstances of the operators. This is not classification. It is arbitrary and vicious selection.

The theory of the Court below was that merely because Plaintiff in Error happened to be a *corporation*, that ended the matter; the Legislature could classify *corporations* in any manner for the purpose of levying a tax without any reference to the nature of the tax (R. 38). In this it committed error.

2. The Statute and an Analysis Thereof.

This tax was imposed by Section 24 of the Act of 1 June 1889, P. L. 420, 431 (Pa. St. 1920, §20,388). For the convenience of the Court

* In this brief the term "corporate taxicab operator" includes corporations who are either corporations, joint stock associations or limited partnerships and "non corporate taxicab operator" includes operators who are either individuals or general or common law partnerships.

it is printed in its entirety as *Appendix "A"* at page 71 *infra*.

The tax is 8 mills upon the dollar of the gross receipts.

An analysis of this Section shows that the following classes of public service operators are subjected to this tax:—

1. "Every railroad company, pipe line company, conduit company, steam boat company, canal company, slackwater navigation company, *transportation company*, street passenger railway company, and *every other company, joint stock association or limited partnership* now or hereafter *incorporated* or *organized*" by or under any law of Pennsylvania, any other State, United States or foreign government and doing business in Pennsylvania, "and owning, operating or leasing to or from another *corporation, company, association, joint stock association or limited partnership* any railroad, pipe line, slackwater navigation, street passenger railway, canal or *other device* for the transportation of freight or passengers or oil."

2. "Every telephone or telegraph *company incorporated* under the laws of this or any other State or of the United States and doing business in" Pennsylvania.

3. "Every express *company*, *incorporated* or *unincorporated*, doing business in" Pennsylvania.

4. "Every *firm*, *copartnership or joint stock association* doing express business in" Pennsylvania.

5. "Every electric light *company*, and every palace car and sleeping car *company*, *incorporated or unincorporated*, doing business in" Pennsylvania.

This statute does not purport to tax the gross receipts of all classes of public service operators. No tax, for example, is imposed upon operators of (1) water supply service, (2) gas service (either natural or artificial), (3) steam heat service, (4) toll bridges, or (5) toll roads.

The Court below held that Plaintiff in Error was within the legislative meaning of "transportation company" and "every other company owning, operating or leasing any other device for the transportation of passengers" (R. 36-37). Hence Plaintiff in Error is taxed as one of the operators in the *first* class of public service operators.

Now it is clear that this first class includes only *corporate* operators. The language used is "company, joint stock association or limited

partnership * * * *incorporated* or *organized* by or under the laws" of Pennsylvania, other States, the United States or foreign governments. Such language can not apply to the *non corporate* operator who operates either as an individual or as a general partnership. This is made doubly certain when we examine the language used in describing the other classes:—

Class 2 also includes only *corporations*.

Class 3 includes *corporations* and *unincorporated* companies.

Class 4 includes *firms, partnerships* and *joint stock associations*.

Class 5 includes *corporations* and *unincorporated* companies.

When the Legislature has so carefully designated the types of operators which are included in each class, no doubt can exist that the first class includes only the *corporate* operator.

3. The Tax Imposed is not a Tax Peculiar to Corporations.

An analysis of the statute shows not only that the tax is imposed solely on the *corporate* taxicab operator, but also that the tax is not one *peculiar to corporations*.

The tax is 8 mills upon the gross receipts derived from the public service operations of the taxpayer.

While the tax is imposed upon such gross receipts only of *corporate* taxicab operators (Class 1) and *corporate* telephone and telegraph operators (Class 2), nevertheless the tax is imposed alike upon the gross receipts of every "express company, *incorporated* or *unincorporated*, and every *firm, co-partnership* or joint stock company or association doing express business" (Classes 3 and 4), and of every electric light company, palace car and sleeping car company, "*incorporated* or *unincorporated*" (Class 5).

A proper consideration of this case necessitates the reiteration of this fact: *That the 8 mills tax is not a tax peculiar to corporations.* By the terms of the statute it is levied, in some cases, alike on the *non corporate* as well as the *corporate* operator. It is unlike a *capital stock tax*, which of necessity can apply only to artificial taxpayers. It is unlike a license or an excise tax which we shall discuss later. *The tax in question is a property tax not peculiar to corporations.*

Even in Pennsylvania this distinction is important. The Gasoline and Liquid Fuel Tax Acts of 20 May 1921, P. L. 1021 and 15 June 1923, P. L. 834 (Pa. St. Supp. 1924, 20,459b) imposed a tax of 2*c* a gallon on gasoline and liquid fuels sold at retail and required the vendor

(whether *corporate* or *noncorporate*) to collect the tax and pay it to the State. In *Schoyer et al. vs. Comet Oil & Refining Company*, (1925) 284 Pa. 189, a *corporate* vendor had sold gasoline and had failed to pay over the required tax. Upon the sale of its real estate under a first mortgage, the Commonwealth claimed priority on the fund. This claim was asserted under the Act of 15 June 1911, P. L. 955 (Pa. St. 1920, §20,529) which gave the Commonwealth, for all taxes settled against a *corporation*, a first lien on the fund arising from the sale of the property of a *corporation* at judicial sale. In holding the Act of 15 June 1911 unconstitutional as applied to the collection of that tax, Mr. Justice Kephart phrased the question (page 192):—

> "Is a statutory classification reasonable and just which gives priority over all claims to a Commonwealth lien for money collected by a *corporation* as a tax from the sale of gasoline, when there is no such lien where an *individual* collects as vendor and retains the tax?"*

After discussing this question and holding that the classification was arbitrary, he said (page 197):—

> "No reason is presented for the different treatment of the holders of an indebtedness

*In all quotations the italics are ours unless otherwise noted.

> against a *corporation* and the holders of an indebtedness against an *individual* because of a *tax collected based on the same subject*. Nor is there any reason given for a distinction in the rules governing a *corporation* and an *individual* who has collected money and failed to turn it over. *There are no unusual features attaching to the tax or the collector.*"

This case was urged upon the Court below. In refusing to follow it, Mr. Justice Walling said it condemned only the "different method for the *collection* of debts due the Commonwealth by corporations from those due by individuals [and] had no reference to *classification for purposes of taxation*" (R. 39).

We respectfully submit that this is a distinction without a difference. If the Legislature can not arbitrarily classify corporations for the purpose of *collecting* a tax, surely it can not arbitrarily classify them for the purpose of *levying* a tax, when the tax is not one peculiar to corporations. If this were not so then constitutional safeguards and restrictions would apply merely to *procedure* and not to *fundamental and substantive rights*.

When we bear in mind that this 8 mills gross receipts tax *is not a tax peculiar to corporations*, it is clear why the class of cases of which *Fort*

Smith Lumber Company vs. *Arkansas* (1920) 251 U. S. 532, is typical, has no bearing on this case. That was a suit by the State to recover back taxes from a corporation. The tax assessed was a *capital stock tax*. The corporation owned stock in two other domestic corporations which had paid the capital stock tax, and it contended that it was entitled to omit the value of such stock from the valuation of its own capital stock on the ground that *individuals* in the State were allowed a similar exemption in the listing of their property for taxation. In sustaining the act, Mr. Justice Holmes said (page 533):—

> "We are of opinion that it also is within the power of a state, so far as the Constitution of the United States is concerned, to tax its own *corporations* in respect of the stock held by them in other domestic corporations, although *unincorporated stockholders* are exempt. A state may have a policy in taxation. *Quong Wing* vs. *Kirkendall*, 223 U. S. 59, 63. If the state of Arkansas wished to discourage, but not to forbid, the holding of stock in one corporation by another, and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the *privilege* there would be nothing in the Constitution to hinder. A discrimination between *corporations* and *individuals with regard to a tax like this* cannot be pronounced

> arbitrary, although we may not know the precise ground of policy that led the state to insert the distinction in the law."

That case came before this Court on a writ of error to review the judgment of the Supreme Court of Arkansas. It was a 5 to 4 decision, Justices Day, McKenna, Van Deventer and McReynolds dissenting (but without written opinion).*

Even in that decision, Mr. Justice Holmes makes it clear that he is speaking solely of a *capital stock tax*, which obviously can be levied only upon corporations and other associations having the characteristics of corporations. It was a tax peculiar to *corporations*. In the case at bar, however, the tax is *not one peculiar to corporations*. The difference between the nature of the two taxes clearly distinguishes this class of cases.

Clearly the principle of the *Fort Smith Lumber Company Case* can not be extended beyond its facts, and can not be extended to such a tax as is involved in this case. If the principle should be extended, then there is no reason why corporations can not be classified for the pur-

*The minority was followed by the Supreme Court of North Dakota in *Gamble-Robinson Trust Company vs. Thorsen*, infra page 51.

pose of paying *any tax*. Real estate and personal property taxes could be levied on real estate and personal property *only when owned by corporations*. In fact, all taxes could be levied only upon corporate beings.

4. The Tax Imposed is not an Excise, a Privilege or a License Tax.

This proposition was definitely established by the Supreme Court of Pennsylvania in *Commonwealth* vs. *Harrisburg Light & Power Company*, (1925) 284 Pa. 175. In sustaining the imposition of the mercantile license tax under the Mercantile License Tax Act of 2 May 1899 P. L. 184 (Pa. St. 1920, §14,727) upon the same gross receipts of an electric light company which had already borne the gross receipts tax under the statute in question, Mr. Justice Schaffer said (page 178):—

> "in the first place, this is not double taxation; the *gross receipts tax* is a *general revenue measure*, the mercantile tax is a *license tax* for the *privilege* of vending merchandise."

In the case at bar, Mr. Justice Walling said (R. 36):—

> "The real subject of the tax is the gross receipts of a company engaged in the transportation of freight or passengers, etc."

Upon a writ of error this Court is bound by this construction placed upon the statute by the Supreme Court of Pennsylvania. *Crew Levick Company* vs. *Pennsylvania*, (1917) 245 U. S. 292, 294. Indeed this Court itself definitely held that this tax was not a *privilege tax*. In *Philadelphia & Southern Mail Steamship Company* vs. *Commonwealth*, (1887) 122 U. S. 326, the prior gross receipts tax Acts of 20 March 1877 P. L. 6 and of 7 June 1879, P. L. 112 which imposed this tax upon the enumerated operators without limitation as to the source of those gross receipts were held unconstitutional because they constituted a direct burden upon the gross receipts derived from interstate commerce. Mr. Justice Bradley said (page 342):

> "The second ground on which the decision referred to was based was that the tax was upon the *franchise of the corporation* granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a *tax on the corporate franchise*, because, by the terms of the Act, it was laid equally on the corporations of other States doing business in Pennsylvania."

The present statute which repealed those Acts made no change in the nature of the tax, but

only followed the rule announced in that case and limited the tax to the "gross receipts * * * received from passengers and freight traffic transported *wholly within this State*."

It is therefore clear that this tax is not an excise, privilege or license tax imposed either for the privilege of being a corporation, or for the privilege of transporting passengers for hire. *It is a general property tax imposed on the gross receipts as such derived from the passengers transported.*

This fact is important because it is an irrefutable answer to a class of cases which at first seems to be opposed to the sound contention asserted by Plaintiff in Error.

In dealing with excise, license and privilege taxes, this Court has sustained an extremely broad latitude in legislative bodies, although as we shall point out even with such taxes there is a limit beyond which they can not constitutionally go. But in general the latitude is very broad and purely artificial selections were sustained which are not sanctioned with respect to other taxes.

Flint vs. *Stone Tracy Company*, (1911) 220 U. S. 107, is the leading case of this class. In that case this Court sustained an *excise tax* on

corporations imposed by the Federal Act of 5 August 1909. It was contended that inasmuch as the act imposed a tax solely on *business* when conducted by *corporations* and exempted the same business when carried on by *partnerships and individuals*, it was so arbitrary as to violate the 5th Amendment. This Court sustained the act because the tax was an *excise* tax. Mr. Justice Day said (page 158):—

> "In levying *excise taxes* the *most ample authority* has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see cases in the margin, decided in this court, upholding the power.
>
> "Many instances might be given where this Court has sustained the right of a state to select subjects of taxation, although as to them the 14th Amendment imposes a limitation upon state legislatures, requiring that no person shall be denied the equal protection of the laws. See some of them noted in the margin.
>
> • • • • • • •
>
> "In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy *excise* taxes,

and it could not be said, even if the principles of the 14th Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the *corporations* taxed, and the same business when conducted by a *private firm or individual*. The thing taxed is not the *mere dealing in merchandise*, in which the *actual transactions may be the same*, whether conducted by *individuals* or *corporations*, but the tax is laid upon the *privileges which exist in conducting business with the advantages* which inhere in the *corporate* capacity of those taxed, and which are not enjoyed by *private firms or individuals*. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this *distinctive privilege* which is the subject of taxation, not the *mere buying or selling or handling of goods*, which may be the same, whether done by *corporations* or *individuals*" (page 161).

Here the Court makes it clear that the tax was sustained not because it was imposed on the *business* (which it admitted was the same "whether conducted by *individuals* or *corporations*") but because it was imposed only on the *privilege* of conducting the business in *corporate form*. In the case at bar, the tax is not imposed upon the privilege of transporting passengers with the advantages which inhere in the corporate capacity. It is not an excise, privilege or license tax for the privilege of doing anything in any form. It is solely a general revenue measure levied upon annual receipts *as property*. The actual transportation of passengers by taxicab is the same whether conducted by *corporate* or *non corporate* operators* and no valid reason can be given to justify the arbitrary selection.

In a note we cite other leading cases of this class which, in dealing with excise, privilege or license taxes, have justified similar discriminations.†

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* Thus both the corporate and non corporate taxicab operators must receive a certificate of Public Convenience from and be annually registered by The Public Service Commission. Act of 26 July 1921, P. L. 1374 (Pa. St. 1928, §§ 31207, 31208).

† Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283. An inheritance tax (estate tax) was sustained which classified the beneficiaries into two general groups and also graduated the tax on the amount transferred at death. See note, page 17.

Spreckels Sugar Refining Company v. McClain, 192 U. S. 397. A special excise tax was imposed on sugar refining by the war measure of 13 June 1898 and was measured by the gross receipts in excess of a certain sum. The Court said (page 413): "Clearly the tax is not imposed upon the gross annual receipts as property, but only in respect of the carrying on the business of refining sugar."

But broad as seems to be the power of selection in the imposition of such taxes, yet there is a limit.

In *Southern Railway Company* vs. *Greene*, (1910) 216 U. S. 400 an Alabama statute imposing an additional *franchise* tax on foreign corporations for the privilege of doing business was held invalid. In the course of the opinion Mr. Justice Day said (page 417):—

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial

distinction, bearing a reasonable and just relation to the things in respect of which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. *Arbitrary selection, it has been said, cannot be justified by calling it classification.*

* * * * * * *

"It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. *The fact is that both corporations do the same business in character and kind*, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars."

In the case at bar we contend that both *corporate* and *non corporate* taxicab operators do the same business in kind and character, yet under Section 21 the *corporate* operators are taxed many thousands of dollars for doing exactly the same business which the *non corporate* operators do without any such tax. It is a fanciful distinction to say that there is any real difference

between *corporate* and *non corporate* taxicab operators in the imposition of such a tax.

In *Bethlehem Motors Corporation* vs. *Flynt*, (1921) 256 U. S. 421, a statute of North Carolina imposed a *license* tax upon manufacturers and vendors of automobiles. The basic annual tax was $500 with the provision that if a manufacturer had three fourths of its assets invested in State or municipal bonds or in other property situated in the State and returned for taxation, the tax was reduced to $100. Upon complaint of a foreign corporation this Court held the act unconstitutional as an unlawful discrimination. Mr. Justice McKenna said (page 426):—

> "In resistance to the assertion that the provision discriminates against nonresident manufacturers, the attorney general contends that it is as applicable to resident manufacturers as to nonresident manufacturers, and, of course, his inference is that its condition can be performed as easily by one as by the other, and discriminates against neither.
>
> "To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a nonresident manufacturer, his factory necessarily being in another state, some of its products only at a given time

being within the state. Therefore, there is a real discrimination, and an offense against the 14th Amendment, if we assume that the corporations are within the state."

This completely answers the contention that Plaintiff in Error can avoid taxation by surrendering its charter and operating as a general partnership. This it can not do, with its outstanding obligations, any more easily than the foreign corporations could comply with the arbitrary terms of the North Carolina statute.

In *Air Way Electric Appliance Corporation* vs. *Day*, (1924) 266 U. S. 71, the State of Ohio imposed a *franchise* fee on foreign corporations as follows: (1) On stock with nominal or par value the fee was figured at 3/20 of 1%, upon the proportion of the authorized capital stock represented by property owned and used within the State; (2) On stock without nominal or par value, a flat fee of 5¢ a share on the portion of the number of shares of authorized capital stock represented by the property owned and used in the State. The complaining corporation was a Delaware corporation with no par stock of an admitted value of only $7 a share. In holding that the statute violated the equal protection of the laws, Mr. Justice Butler pointed out that there was no reasonable distinction to justify this treatment of corporations without nominal or par

value stock and corporations with nominal or par value stock. He said (page 85):—

> "It is clear that the mere number of authorized non par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. (citing cases.) *The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application.* (citing cases.) The act violates the equal protection clause of the 14th Amendment."

When we bear in mind that the cases just discussed were dealing not only with license and franchise taxes,* but also with complaints of foreign corporations it is clear that the Court below erred in sustaining the tax in the case at bar as applied to Plaintiff in Error. It is not an *excise, license or privilege* tax. The arbitrary selection is not made between domestic and foreign corporations. On the contrary the tax is one levied on the *gross receipts as property.* The discrimination is between competitors of the same class, and one part of that class (the *corporate* operator) is taxed because it is an *artificial* being rather than a *natural* being. No more arbitrary selection could be imagined.

* For additional cases see *infra*, pages 37-47

5. The Classification being Based Solely upon Whether the Taxicab Operator is an Artificial Being, it is Arbitrary and Illegally Discriminatory.

A. *The Discrimination is Real.*

The *corporate* taxicab operator pays every tax (be it a property, a license, or a privilege tax) which the *non corporate* taxicab operator pays. In addition the *corporate* (domestic and foreign) operator pays a capital stock tax of 5 mills upon the actual value of its capital stock (Act of 22 July 1913, P. L. 903, Pa. St. 1920, §20,366) and a bonus of 1/3 of 1% on the par value of all issued stock, if it be a domestic corporation (Acts of 3 May 1899, P. L. 189, Pa. St. 1920, §5686), or 1/3 of 1% on the amount of capital actually employed in Pennsylvania, if it be a foreign corporation (Act of 8 May 1901, P. L. 150, Pa. St. 1920, §5691). The Court will easily appreciate why this additional tax is an onerous burden on the *corporate* operator.

The tax is 8 mills on the gross receipts derived from the transportation of passengers. For the six months ending 31 December 1923 it amounted to $5,198 on the business of Plaintiff in Error. This is at the rate of over $10,000 a year. Its *non corporate* competitors doing the very same business in the very same way do not pay one

cent of such tax. And as the tax is levied on the gross (not net) receipts, of course it is no indication of any corporate profit.

The case at bar, therefore, is totally unlike *General American Tank Car Corporation* vs. *Day*, (1926) 270 U. S. 367, where the special tax of 25 mills on the dollar of the assessed value of the rolling stock of foreign corporations was in lieu of all other State taxes which averaged approximately 25 mills. In sustaining that tax Mr. Justice Stone said (page 373):—

> "It is not invalid merely because equality in its operation as compared with local taxation has not been attained with *mathematical exactness.*"

It is not necessary for Plaintiff in Error to show that the Legislature deliberately designed such an unjust discrimination against the *corporate* taxicab operator. As was recently said by Mr. Chief Justice Taft in a somewhat similar case of *Royster Guano Company* vs. *Virginia*, (1920) 253 U. S. 412, 416:—

> "It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is *arbitrary in effect;* and none the less because it is prob-

> able that the unequal operation of the taxing system was due to *inadvertence rather than design.*"

There can be no doubt but that the imposition of a tax of 8 mills upon the gross receipts of only the *corporate* taxicab operators is arbitrary in effect, and it is none the less so because it might have been due to inadvertence rather than to deliberate design.

B. *The Decisions of this Court Condemn a Classification Based Solely upon Whether the Taxpayer is a Corporation or a Natural Person.*

In dealing with taxes other than (1) taxes peculiar to corporations and (2) excise, license or privilege taxes, we believe that this Court has consistently taken the stand that while the 14th Amendment does not impose upon the Legislature an *iron* rule of equal taxation (R. 38), it does impose the rational *constitutional* rule that so-called classifications can not be made solely with reference to the *character* of the taxpayer; that is, whether it is a *natural* or an *artificial* person. The Court below refused to enforce this sound rule, and the enforcement of this rule requires the reversal of this judgment.

As early as 1882 this rule was announced in the lower Federal Courts. In *California Railroad Tax Cases*, (1882) 13 Fed. 722, the County

of San Mateo commenced action for the recovery of State and county taxes claimed to be due from defendant railroad. Defendant contended, among other matters, that the statute and the provision of the State constitution under which the taxes were claimed to be due were invalid as violating the 14th Amendment. The Constitution of California provided that a mortgage deed of trust, *etc.*, which secured the debt was treated for purpose of taxation as an interest in property and "except as to *railroads* and other quasi public *corporations*" the value of the property affected, less the value of the security, was to be assessed and taxed to the owner, and the value of the security was to be assessed and taxed to the holder. The Circuit Court (composed of Mr. Justice Field of this Court and Judge Sawyer of the District Court) held this provision unconstitutional as denying equal protection of the laws. In holding that this was not proper classification, Mr. Justice Field said (page 737):—

> "It is not classifying property to make this distinction in determining its value. It is not classifying property to provide that the property of *certain parties*, which has a mortgage upon it, shall be assessed at its value after deducting the mortgage; and that the property of *other parties*, also having a mortgage upon it, shall be taxed at its full value without any deduction. That is

not providing for a different rate of taxation for different kinds of property, *but for unequal taxation according to the character of the owner.*"

Circuit Judge Sawyer in concurring, said (page 773):—

"Classification should have reference to the different character, situation, and circumstances of the *property*, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made with mere reference to the nationality, color or *character of the owners, whether natural or artificial persons*, without any reference to a difference in the character, situation, or circumstances of the *property*. If the arbitrary discrimination and classification found in this case can be legally made under the constitution and the law of the land, *then the constitution or the law can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances, or condition of the property.* A person may be classified and defined out of the equal protection of the law; and if so with reference to this provision, he can also be classified and defined out of uniformity in the operation of the law in other particulars; out of the protection of due process of law, and of the provision forbidding a law impairing the

obligation of contracts, or taking property for public use without just compensation; and, indeed, out of all the guaranties of the constitution, state or national. I am not arguing that property of all kinds may not be taxed where it is found; but in this case there is a personal liability sought to be enforced *against the defendant for taxes not imposed upon others in like circumstances, without any means provided for reimbursement, such as are applicable to others similarly situated, by the party who ought to pay the tax.*"

This case was appealed to this Court where the appeal was dismissed because a compromise had been effected between the parties. *County of San Mateo* vs. *Southern Pacific Railroad Company*, (1885) 116 U. S. 138.

A similar decision was rendered in the companion cases of *County of Santa Clara, et al.* vs. *Southern Pacific Railroad Company, et al.*, (1883) 18 Fed. 385, where the same provisions of the constitution and statutes were involved, Mr. Justice Field holding them unconstitutional in line with his earlier decision. These cases were appealed to this Court, *Santa Clara County et al. vs. Southern Pacific Railroad Company et al.*, (1886) 118 U. S. 394, 417. The judgments were affirmed, but upon an entirely dif-

ferent point, this Court not passing upon the constitutionality of the California constitution and statute (page 410). In concurring Mr. Justice Field said (page 422):—

> "I agree to the judgment of the court in this as also in the other tax cases from California. But I regret that it has not been deemed consistent with its duty to decide the *important constitutional questions involved*, and particularly the one which was so fully considered in the circuit court, and elaborately argued here, *that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution.* At the present day nearly all great enterprises are conducted by corporations. Hardly an industry can be named that is not in some way promoted by them, and a vast portion of the wealth of the country is in their hands. It is, therefore, of the greatest interest to them whether their property is *subject to the same rates of assessment and taxation as like property of natural persons, or whether elements which affect the valuation of property are to be omitted from con-*

sideration when it is owned by them, and considered when it is owned by natural persons; and thus the valuation of property be made to vary, not according to its condition or use, but according to its ownership. The question is not whether the State may not claim for grants of *privileges* and *franchises* a fixed sum per year, or a percentage of earnings of a corporation—that is not controverted—but *whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations.* The question is of transcendent importance, and it will *come here and continue to come* until it is authoritatively decided in *harmony with the great constitutional Amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions.*"

In commenting upon this concurring opinion, William D. Guthrie, Esq., in his authoritative work: *The Fourteenth Amendment to the Constitution of the United States*, (1898) said (page 121):—

"This was said in May, 1886, but the point has not been squarely decided to this day. The question arose in *Northern Pacific Railroad Co.* vs. *Walker*,* argued before United

* 47 Fed. Rep. 681, 685, 686.

States Judges Caldwell and Thomas, of the Eighth Circuit. In that case lands belonging to railroad companies were exempted *simply because owned by such companies*, presenting the converse of a tax law discriminating against railroads. It was held that property of the same kind and in the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation and taxed by a different rule, *because it belongs to different owners, whether natural persons or corporations.*"

This is the rule for which we are contending.

The statute under consideration imposes a general tax upon the gross receipts as property. The property of the *corporate* and the *non corporate* taxicab operator are of the same kind and in the same condition, yet this statute arbitrarily sub-divides this property into two classes and taxes the one merely because it belongs to *corporate* persons.

As we have hitherto said, the Court below held that Plaintiff in Error was within the legislative meaning of "transportation company" and or "other company, *etc.*" In sustaining that construction Mr. Justice Walling said (R. 36):—

> "It is difficult to suggest a reason why a railway or street car company transporting passengers from one part of Philadel-

> phia to another should bear a burden from which a taxicab company performing a like service is exempt."

And with the same force we add:—

> It is difficult to suggest a reason why a *corporate* taxicab operator transporting passengers from one part of Philadelphia to another should bear a burden from which a *non-corporate* taxicab operator performing a like service is exempt.

In *Magoun* vs. *Illinois Trust & Savings Bank*, (1898) 170 U. S. 283 which sustained a graduated inheritance tax (an *excise* tax), it was apparently admitted by all that such a principle of classification could not be extended to other taxes. This is clear from the dissenting opinion of Mr. Justice Brewer where he said (page 302):—

> "It seems to be conceded that if this were a *tax upon property* such increase in the rate could not be sustained, but being a tax upon the succession it is held that a different rule prevails."

And in the opinion of the Court, Mr. Justice McKenna said, in discussing the rule of uniformity and equal protection (page 293):—

> "it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indis-

> criminate operation on *persons merely as such*, but on persons according to their relation. In some circumstances it [the State] may not tax A more than B, but if B be of a *different trade* or *profession* than B, it may, *etc.*"*

The case at bar supplies the "circumstances" where the State may not tax A (the *corporate* operator) more than B (the *non corporate* operator) because here both are in the *same* business; the only difference is that A was created by laws of man and B by the laws of Nature. Such a distinction can not satisfy the 14th Amendment.

In *Quong Wing* vs. *Kirkendall*, (1912) 223 U. S. 59, a Montana statute imposed an annual *license* fee of $10 upon all persons engaged in the laundry business other than the steam laundry business, with a proviso that it should not apply to women so engaged, where not more than 2 women were employed. Taxpayer was a Chinaman and contended that this statute unduly dis-

* The same thought was aptly expressed by Mr. Justice Paxson in *Appeal of Fox* (1886) 112 Pa. 337, 353 ...

> "The power of the state is extended to select its subjects of taxation. It may tax mortgages or it may omit to tax them. It may tax horses or it may omit to tax them. But the tax upon whatever kind, must be uniform. That is to say upon all taxpayers alike. It cannot tax A on his mortgages or his horses, and exempt B from a like tax. Nor do I see any distinction here between natural persons and artificial persons, commonly called corporations. Each must bear its due share of the public burdens."

criminated against hand laundries in favor of steam laundries, and against men in favor of women. The opinion of this Court was delivered by Mr. Justice Holmes. He justified the statute on the *police power*, considering the statute more of a police measure than a tax measure. He intimated that if the taxpayer had raised the question that this was a discrimination against Chinamen, he might have been successful; but that question was not raised; in fact it was denied by counsel. Mr. Justice Hughes concurred only in the result. Mr. Justice Lamar dissented on the ground that the statute was not a police measure but a revenue measure which made an arbitrary distinction. He said (page 64):—

> "*It taxes some and exempts others engaged in identically the same business.* It does not graduate the *license*, so that those doing a large volume of business pay more than those doing less. On the contrary, it exempts the large business and taxes the small. It exempts the business that is so large as to require the use of steam, and taxes that which is so small that it can be run by hand. Among these small operators there is a further discrimination, based on sex. It would be just as competent to tax the property of men and exempt that of women. *The individual characteristics of the owner do not furnish a basis on which to make a*

> *classification for purposes of taxation. It is the property or the business which is to be taxed, regardless of the qualities of the owner.* A discrimination founded on the *personal attributes of those engaged in the same occupation*, and not on the value or the amount of the business, is arbitrary."

This statement of Mr. Justice Lamar is apposite because the statute in the case at bar (so far as Plaintiff in Error is concerned) taxes the *corporate* operator and exempts the *non-corporate* operator engaged in identically the same business. The individual attributes of the operator (the owner of the business) furnish the only basis on which the classification is made because the only distinction is between *corporate* and *non corporate* operators. This basis is purely arbitrary.

In *Pullman Company* vs. *Knott*, (1914) 235 U. S. 23, a Florida statute placed a *gross receipts* tax on sleeping car and pullman car companies. The Pullman Company contended that the tax was invalid and discriminatory because it did not fall upon railroads operating their own sleeping and palace cars. The record (unlike the record in the case at bar) did not show that any railroad company in the State of Florida was operating its own sleeping or parlor cars. In discussing this point, Mr. Justice Holmes said (page 25):—

"It is suggested that there is an arbitrary classification because the tax is confined to sleeping and parlor car companies, and does not fall upon railroads operating their own sleeping and parlor cars. If otherwise this were a valid objection, *as to which we need express no opinion*, it is enough to say that a tax is not to be upset upon *hypothetical and unreal possibilities*, if it would be good upon the facts as they are (citing cases). It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the attorney general of the state denies that such a case exists."*

This expression indicates clearly that this Court has never sanctioned a rule which would permit a gross receipts tax to be laid upon the gross receipts of only *corporate* taxicab operators while the gross receipts of the competing *non corporate* operators are exempt from such tax. If this Court doubted whether a Legislature could classify and tax only the sleeping car and parlor car companies and exempt the competitive railroads who own and operate their own equipment of a similar nature, then there can be no doubt that the Legislature can not sub-classify the class of taxicab operators and tax only the *corporate* taxicab operators and exempt their com-

* Where the case *Johnson* does show such exemption for railroads such a tax classification has been held invalid. *The Checker Taxicab Company vs. Texas*, see note, page 34.

petitor *non corporate* taxicab operators because there is no difference between them save only the method by which they were brought into being. And in addition the record in the case at bar does contain facts which show the real discrimination (R. 5).

In *Chalker* vs. *Birmingham & Northwestern Railway Company*, (1919) 249 U. S. 522, a Tennessee statute imposed an annual *license* tax of $100 in each county upon a person engaged in railway construction work who had his chief office *without* the State, and a tax only of $25 in each county upon a person engaged in the same business who had his chief office *within* the State. It was contended that this form of taxation violated the 14th Amendment as well as Article 4, Section 2 of the Federal Constitution.*

In holding the statute unconstitutional as applied to a citizen of Alabama, who had his chief office in that State and was engaged in railway and construction work in Tennessee, this Court based its conclusion upon Article 4, Section 2 of the Constitution. Mr. Justice McReynolds said (page 526):

"The power of a State to make reasonable and natural classifications for purposes of

* "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

taxation is clear and not questioned; but neither under form of classification nor otherwise can any state enforce taxing laws which, in their practical operation, materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several states."

And further (page 527):—

"We can find no adequate basis for taxing individuals according to the location of their chief offices,—the classification, we think, is arbitrary and unreasonable. Under the Federal Constitution a citizen of one state is guaranteed the right to enjoy in all other states equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them."

While that case was decided on a right guaranteed by a different Section of the Constitution, nevertheless the *ratio* of the case controls the case at bar.

If it is unreasonable to make a classification of taxpayers according to the *location* of their chief offices, it is likewise unreasonable to make a classification of taxpayers based solely upon the personal *characteristics* of the taxpayer, especially so when the tax imposed is not a tax peculiar to those characteristics. It is impossible for all

taxpayers to do business as individuals or as general partnerships. Business necessities force some taxpayers to operate as corporations. It is just as impossible, therefore, to have all taxicab operators operate as individuals or as general partnerships as it is to have all railroad construction contractors maintain their chief offices in Tennessee.

In *Royster Guano Company* vs. *Virginia*, (1920) 253 U. S. 412, a Virginia income tax act exempted domestic corporations which transacted no business within the State (except the holding of stockholders meetings) from the payment of any income tax, but levied a tax on domestic corporations transacting business both within and without the State, based on the business transacted without as well as that transacted within the State. In holding such an act violative of the 14th Amendment, Mr. Chief Justice Taft said (page 415):—

> "Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved *if the classification appear to be altogether illusory.*"*

He then pointed out that the purpose of the statute was to exempt such domestic corporations

* See also Schlesinger vs. Wisconsin (1926) 270 U. S. 230, 240 where Mr. Justice McReynolds said: "A classification for the purposes of taxation must rest on some reasonable distinction."

because they derived no protection from the State warranting a tax on income earned elsewhere and were liable for taxes to the States where the income was earned. He then continued to show how illusory the classification was, saying (page 104):—

> "But no ground is suggested, nor can we conceive of any, sustaining this exemption, which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the state where they also transact income producing business within the state. Corporations of this class derive no more protection from the state of their origin with respect to their outside business, and are no less subject to taxation by the states in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes by the state of origin. Their business done within the state presumably is of some general benefit to the state, certainly enriches its treasury by the amount of the taxes they pay upon the income derived therefrom; and the imposition upon them under chapter 472 of taxes not only upon this income, but also upon income that they derive from business conducted outside of the state (similar income of the favored corpora-

tions being exempted), has the effect of discriminating against them for that which ought to operate, if at all, in their favor. *It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design.*"

In the case at bar the same reasoning applies. Plaintiff in Error derives no more governmental protection from the State than its competing *non corporate* operators obtain. As we have previously pointed out the *corporate* operators pay all (and more) taxes paid by the *non corporate* operators. If corporations can not be so subclassified for the imposition of a *net* income tax, then surely taxicab operators can not be subclassified into *corporate* and *non corporate* operators for the imposition of a *gross* income tax when the business of all taxicab operators is conducted alike and the only difference is the individual characteristics of the operators.

And finally in the very recent case of *Hanover Fire Insurance Company vs. Carr*, (decided 23 November 1929) 71 L. ed. 322, Illinois imposed

a tax upon 100% of the *net receipts* of the foreign fire insurance companies and at the same time imposed a tax upon approximately 30% of the same receipts of domestic fire insurance companies. This Court held this tax invalid as denying the equal protection of the laws. Mr. Chief Justice Taft said (page 231):—

> "But an *occupation* tax imposed upon 100 per cent. of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the *same class and in the same business* which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent. of the full value of that property. It is a denial of the equal protection of the laws: (citing cases)."

Our position does not run counter to the rule long established by this Court that the Legislature may exempt from the general class a particular group which operates for a distinctly different purpose. Several illustrations will make this clear. In *Citizens Telephone Company* vs. *Fuller*, (1913) 229 U. S. 322, Michigan prior to 1909 taxed telephone companies at the rate of 3% on the gross receipts. In 1909 the law was amended and provided for the assessment by a State Board of Assessors on the property of

telephone companies on an *ad valorem* basis. The statute contained this proviso (page 325):—

> "Provided, that the property of telephone and telegraph companies whose gross receipts within the state, for the year ending June 30th, did not exceed $500,00, shall be exempt from taxation."

In the opinion of Mr. Justice McKenna sustaining this tax, he points out that this exemption in fact applied to *mutual telephone companies or farmers' exchanges which were not operated for profit*, saying (page 328):—

> "The difference, therefore, between the taxpaying and non-taxpaying companies or individuals, is that the former, as said by the district court, belong to *commercial corporations* or *enterprises*, organized and conducted for the purpose of earning and paying profits as or in the nature of dividends, the latter, the *untaxed*, are *cooperative or farmers mutual associations*, usually unincorporated, conducted at estimated costs, and *organized primarily to get for the association cheap telephone service*."

This is only the application of the same general principle which permits the Legislature, if it chooses, to "exempt certain class of property from any taxation at all, such as churches, libraries and the property of charitable institutions." *Bell's Gap Railroad Company* vs. *Penn-*

sylvania, (1890) 134 U. S. 232, 237. They are all operated on a cooperative non profit making basis.

The same rule was applied in *Northwestern Mutual Life Insurance Company* vs. *Wisconsin*, (1918) 247 U. S. 132, where an annual *license tax* on level premium life insurance companies was sustained although fraternal and beneficial societies having lodges and insuring only the lives of members were exempt.

That rule, however, cannot be extended to the case at bar. Here both the *corporate* and the *non corporate* operators operate for profit. They operate precisely in the same manner and for the same purpose.

We respectfully submit that under the basic rule announced by this Court, this arbitrary and illusory sub-classification of the statute in the case at bar (based solely upon the characteristics of the taxpayer) must give way to the fundamental guarantees of the 14th Amendment.

C. The Decisions of State Courts Condemn a Classification Based Solely upon Whether the Taxpayer is a Corporation or a Natural Person.

There are several similar cases decided under the 14th Amendment by the State Courts which support the asserted rule.

In *Russell* vs. *Croy*,* (1901) 164 Mo. 69, the Missouri constitution contained provisions similar to those in the California constitution.† The Court held the provisions violated the 14th Amendment. After referring to the *California Tax Cases* (pages 98-100) and in speaking of the power of classification, Mr. Justice Valliant said (page 107):—

> "It is not denied that the State may classify property for taxation. And nothing said herein is to be understood as drawing in question or casting any doubt as to the validity of Section 5, article 10, of our Constitution, relating to the taxation of railroad corporations, but we do mean to say the classification must rest on some reason *other than mere ownership* and that different pieces of property of the same kind, held and used for the same or similar purposes, within the same jurisdiction, can not lawfully be so classified as that one is subjected to the tax and the other exempt, merely because *one belongs to a natural person* and the *other to a corporation*, or that one is the obligation of a *corporation* and the other that of a *natural person*, or one that of a large concern and the other that of a small one."

* Cited with approval in Southwestern Bell Telephone Company vs. *Middlekamp* (1921) 1 F. (2nd) 963, 965.

† See *ante*, page 31.

In *Gamble-Robinson Fruit Company* vs. *Thoresen*,* (North Dakota, 1925) 204 N. W. 861, corporations were subject to what was denominated a corporate excess tax. Under another statute moneys and credits were exempted from taxation in North Dakota. In determining the so-called corporate excess tax, the corporation claimed the right to deduct moneys and credits from its assets, for otherwise the effect of the statute would be to tax moneys and credits of *corporations*, joint stock companies or associations, while leaving untaxed the moneys and credits of *individuals*. In holding that the statute violated the equal protection clause of the 14th Amendment unless corporations were allowed to make the deduction, Mr. Justice Birdzell said (page 864):—

> "It is not contended, and doubtless would not be argued, that the Legislature could constitutionally provide for the exemption of moneys and credits owned by *individuals* while taxing moneys and credits owned by domestic *corporations*, joint-stock companies, and associations; nor, conversely, that corporations, joint stock companies, and associations could be exempted as to their moneys and credits while individuals are taxed. It is one thing to sustain a corporate excess tax law as a part of a uniform *ad valorem* as-

* Compare *Fort Smith Lumber Company* vs. *Arkansas*, supra page 19.

sessment system, and quite a different proposition to consider a corporate excess tax law in a system permitting classification and exemption of property for tax purposes, in which the benefit of exemptions expressly provided *are not extended to domestic corporations, joint-stock companies, or associations.*

* * * * * * *

"It requires no argument to prove that the *character of the ownership—that is, as to whether a given species of property is owned by a corporation, joint-stock company, or association, or owned by an individual—affords no reasonable basis for classification.* If so, it could as well be provided that corporations, joint-stock companies and associations should pay at a certain rate of valuation upon their real property, while individuals should pay according to a different rate. So, manifestly, considering the act in question as one imposing a tax upon the property or stock of the corporation, it necessarily has the effect of depriving it of the benefit of the exemption upon moneys and credits, either wholly or partially. If, therefore, the legislation is subject to the constitutional limitation of equal protection, it cannot be sustained."

It was contended by the State that this was a *franchise* tax and hence corporations could be

treated differently, but the Court held it was a *property* tax, saying (page 866):—

> "Hence, we held that the tax in question is a *property tax* levied upon the value of the corporate franchise, considered as *property*, and as including every advantage accruing to the corporation by virtue of the facilities afforded by the state. It follows that the tax must conform to the constitutional requirement of uniformity, and that those against whom it is assessed are entitled to the equal protection of the laws."

In concluding, Mr. Justice Birdzell held (page 867):—

> "We are further of the opinion that a tax so determined violates Article 14 of the amendments to the federal Constitution, guaranteeing to all persons the equal protection of the laws, in that it *denies to corporations, joint stock companies, and associations*, wholly or partially, the benefit of Chapter 307 of the Session Laws of 1923, exempting moneys and credits from taxation."

The several State constitutions contain provisions relative to uniformity of taxation. While they are expressed in different language* the

* Article IX, §1 of the Pennsylvania Constitution (Pa. St. 1920, page XXIX) provides: "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, etc."

basic idea is to protect taxpayers from unfair and arbitrary classifications and discriminations. The following cases, we believe, establish the rule that the classification made in the case at bar is wholly arbitrary and illusory.

In *The Pullman Palace Car Company* vs. *Texas*, (1885) 64 Texas 274,* the State constitution provided that all occupation taxes shall be equal and uniform upon the same class of subjects. The statute placed an occupation tax on every person, firm or corporation owning or operating palace, sleeping, or dining room cars "not owned by the railroad company" of $2 per mile for each mile over which the cars operated. The Pullman Company contended that this occupation tax was in violation of the State Constitution because it exempted railroads operating similar cars over their own lines. In holding the tax unconstitutional because it exempted competing railroad companies operating their own similar cars, Mr. Justice Stayton phrased the question (page 278):—

> "Do railway companies who run cars of the kinds named in the statute on their own roads pursue *the same class of occupation* as those who own or run cars of the same kind on the railways of others?"

* See note, page 40, for a discussion of a somewhat similar case coming to this Court from Florida.

After discussing this question, he held (page 279):—

"There is no act or fact entering into the occupation of running such cars as are mentioned in the statute, over the road of another, which does not enter into the occupation of the road owner who runs over his own road the same kind of cars for the same uses and purposes, from which the road owner can be withdrawn from the class on which the statute imposes the tax.

"If the things done constitute in *one person or corporation* the taxed occupation, *no one doing the same things can be omitted from the class taxed, without a violation of the constitutional provision;* even though the omitted or excepted person or corporation may do more or other things than are necessary to constitute the taxed occupation, and though that done in excess may, within itself, constitute a distinct occupation subject to taxation, however kindred in nature the occupations may be.

"The Legislature may classify subjects of taxation, and these classifications may, as they will, be more or less arbitrary; *but when the classification is made all must be subjected to the payment of the tax imposed, who, by the existence of the facts on which the classification is based, fall within it,* unless exempted under some other constitutional provisions."

In the case at bar, *all* taxicab operators obviously constitute the class, and hence the *non corporate* operator doing the same things as the *corporate* operator can not be omitted from that class whose gross receipts are taxed.

In *Parker* vs. *North British & M. Insurance Company*, (1890) 42 La. Ann. 428, 7 So. 599, it was held that a law levying a tax upon the *gross receipts* of *foreign insurers* against fire losses and water perils, as a *property tax* pure and simple, and *not as a license tax* or a condition upon which they are permitted to do business in the State, no matter by what name it may be called, was void for want of uniformity and equality, when no *gross receipts* tax was laid on *domestic* insurers or on any other kind of business. See also: *Mutual Reserve Fund Life Association* vs. *Augusta*, (1900) 109 Ga. 73, 35 S. E. 71.

In *Adams* vs. *Yazoo & Mississippi Valley Railroad Company*,* (1898) 77 Miss. 194, 24 So. 200, the State constitution provided in Art. 12:—

> "§13. The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals."
>
> "§20. Taxation shall be equal and uniform throughout the State; all property

* This case was appealed to this Court but this question was not discussed, see *Yazoo & Mississippi Valley Railroad Company* vs. *Adams*, (1901) 180 U. S. 1.

shall be taxed in proportion to its value to be ascertained as directed by law."

As *obiter dicta* Mr. Justice Whitfield said (page 276):—

"Reading these constitutional provisions in the light of their history, and with due regard to the words in which they are expressed, it is impossible for us to doubt that it was not competent for the general assembly, in the imposition of taxes, to distinguish or *discriminate in favor of corporate property subject to taxation*. If property of a particular kind is subjected to taxation, and owned by a *corporation*, it must bear the rate of taxation imposed on *individuals*. While the constitution inhibits the exemption or discrimination in favor of corporations, *it equally inhibits a discrimination against them*. Equality in bearing a common burden, which is naturally right, and equity, is *secured alike to the corporation and to the citizen*."

In *State* vs. *Stonewall Insurance Company*, (1890) 89 Ala. 335, 7 So. 753, the question was whether a corporation was entitled to deduct the amount of capital stock invested in State bonds in arriving at the value of its capital stock for a *capital stock* tax. Mr. Justice Clopton said (page 340):—

"If a part of the money capital of an *individual* be invested in State bonds, it will be conceded that such part is not liable to taxation. Why, then, should it be held that the portion of the capital of *corporations* so invested is taxable in face of the constitutional mandate, 'the property of private *corporations*, associations and *individuals* of the state shall forever be taxed at the same rate' which includes not merely the technical rate, but also the mode of assessment. • • • Any other construction of the revenue laws nullifies the provisions as to exemption, discriminates *against corporations* in the matter of taxation contrary to the letter of the constitution, etc."

In *United States Express Company* vs. *Ellyson*, (1869) 28 Iowa 370, the State constitution (Article 8, §2) provided:—

"The property of all *corporations*, for pecuniary profit, shall be subject to taxation, the same as *individuals*."

In discussing the telegraph and express tax statute Mr. Justice Cole said, *obiter dictum*, (page 374):—

"But if the Act did prescribe a rule for taxation of the property of *corporations*, different from that prescribed for the taxation of the same class of property, when owned by *individuals*, we see no escape from the con-

clusion that it would be in conflict with the clause of the Constitution relied upon and quoted above, and hence inoperative and void."

In *The Standard Life & Accident Insurance Company* vs. *Detroit*, (1893) 95 Mich. 466, the State constitution provided (Article 14):—

"§11. The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.

"§12. All assessments hereafter authorized shall be on property at its cash value."

Mr. Justice Montgomery said (page 468):—

"It is clear that, in so far as the amendments to Sections 2 and 4 attempt to provide that *banks and insurance companies* shall not have deducted from their assets the amount of real estate mortgages upon which they respectively pay taxes, they are in contravention of these provisions of the Constitution. If the net assets of these institutions should consist wholly in real-estate mortgages, then under the terms of the law of 1891, as amended, *the corporations would be assessed for the full amount upon the real estate mortgages held by such companies.* That this is a violation of the rule of uniformity of taxation, it needs no argument to demonstrate (citing cases, among them the *California Railroad Tax Cases*)."

In *Danville* vs. *Quaker Maid, Inc.*, (1925) 211 Ky. 677, 278 S. W. 98, a city imposed a *license tax* on the business of retailing groceries, meat, fish and oysters. It classified groceries into: (1) Regular service grocery stores not employing more than 2 employes—$12 per year with $5 for each additional employe over 2; (2) Cash and carry grocery stores not self-service, and not employing more than 2—$50 per year and $25 for each additional employe over 2; (3) Self-service, cash and carry grocery stores not employing over 2 persons—$40 per year with $30 for each additional employe over 2. Taxpayer was assessed in the 2nd class, and brought a bill in equity to enjoin enforcement of the tax ordinance on the ground of discrimination. The proof showed that the business of the taxpayer was in all respects the same as that of ordinary grocery stores which paid the $12 tax (1st class), except that the taxpayer never sold on credit and made no deliveries except in extraordinary cases.

The Court sustained the bill, Mr. Justice Dietzman saying (page 678):—

> "The only difference between the business of appellee and that of the ordinary grocery is that appellee extends credit to no one and makes no deliveries. But this difference in this detail of conducting the business affords

> no reasonable ground for classifying appellee on a basis for taxation purposes different from that of the ordinary grocery store. * * * They both sell the same kind of groceries for practically the same price and in the same quantities to practically the same class of people. The details of credit and delivery are alone not enough to afford a reasonable basis for a classification attempted in this case."

It is evident, therefore, that in the case at bar the mere detail of the characteristics of the operator (that is conducting business in *corporate* form rather than *non corporate* form) affords no reasonable ground for taxing the gross receipts of the *corporate* operator and exempting the similar gross receipts of his competitor, the *non corporate* operator. This detail or quality of the operator is just as illusory as a basis for classification for the imposition of such a tax as this, as was the basis of extension of credit and delivery in the grocery business.

6. The Discrimination in this Statute is Clear and Hostile against Corporate Taxicab Operators and is of an Unusual Character Unknown to the Practice in Pennsylvania.

In *Bell's Gap Railroad Company* vs. *Pennsylvania*, (1890) 134 U. S. 232, Mr. Justice Bradley

in speaking of the requirement of the 14th Amendment said (page 237):—

> "But clear and hostile discrimination against *particular persons* and *classes*, especially such as are of an *unusual* character, *unknown* to the practice of our governments, might be obnoxious to the constitutional prohibition."

From what has already been stated, it is certain that the statute under consideration is a clear and hostile discrimination against *corporate* persons based solely upon the fact that they are corporate and not natural persons.

In a brief way we now call attention to the fact that the statute under consideration is of an unusual character, practically unknown to the tax practice of Pennsylvania. The following statutes (and some imposed only *license* taxes) never made the discrimination here involved.

The Gross Receipts Tax on Express Business Act of 28 April 1899, P. L. 72 (Pa. St. 1920, §20280), levies a tax of 8 mills on the *gross receipts of "every corporation, limited partnership, joint-stock association, partnership, firm or association of individuals, incorporated or unincorporated,* engaged in the business commonly known as the express business."

The Mercantile License Tax Act of 2 May 1899, P. L. 184 (Pa. St. 1920, §14,727) is a revision and consolidation of the mercantile taxes which had existed in Pennsylvania for generations.* This Act levies (1) on each *retail* vendor or dealer in goods, wares and merchandise an annual tax of $2. and 1 mill additional on the gross revenue; (2) on each *wholesale* vendor or dealer an annual tax of $3. and ½ mill additional on the gross revenue; and (3) on each dealer or vendor at any *exchange* or *board of trade* a tax of 25¢ on each $1,000 gross revenue. This Act applies to all such dealers or vendors, whether they be *corporate* or *non corporate*.

The License Tax on Brokers Act of 7 May 1907, P. L. 175, (Pa. St. 1920, §2395) levies a graduated *license* tax on "all brokers, whether stock brokers, bill brokers, note brokers, exchange brokers, merchandise brokers, factors or commission merchants, real estate brokers and agents, or pawn brokers *whether persons, firms, limited partnerships or corporations.*"

The Restaurant License Tax Act of 25 April 1907, P. L. 117 (Pa. St. 1920, §14,750) levies an annual *license* tax of $2. and 1 mill additional on each dollar of gross revenue on "*each and*

* *Commonwealth vs. Lutz*, (1925) 284 Pa. 184, 187.

every individual, firm, copartnership or corporation engaged in carrying on a restaurant, eating house, cafe or quick lunch business."

The Shooting Gallery *etc.* License Tax Act of 25 May 1907, P. L. 244 (Pa. St. 1920, §14,752) levies an annual *license* tax on "*every person, firm, limited partnership or corporation*" operating a shooting gallery, poolroom, bowling alley, etc.

This list of tax acts, while it may not be exhaustive, clearly shows that the established policy of the Commonwealth (whether in levying a flat annual tax or a tax based on *gross receipts*) is to make the tax applicable to *non corporate* as well as *corporate* taxpayers of the same class. But the statute under consideration, although it is not (1) a *license* tax or (2) a tax *peculiar to corporations*, yet levies the tax solely upon the gross receipts of *corporate* taxicab operators.

With such a legislative history (and as was aptly said by Mr. Justice Holmes in *New York Trust Company* vs. *Eisner*, (1921) 256 U. S. 345, 349: "Upon this point a page of history is worth a volume of logic"), the discrimination in the statute under consideration is therefore not only clear and hostile, but is of an unusual char-

acter unknown to the practice of the Commonwealth of Pennsylvania, and is obnoxious to the constitutional prohibition.

In case Defendant in Error should rely upon *Heisler* vs. *Thomas Colliery Company*, (1922) 260 U. S. 245, sustaining the Coal Tonnage Tax Act of 11 May 1921, P. L. 479 (Pa. St. 1924, §20,459a) which levied a tax of 1½% on the value of *anthracite* coal when mined, washed, screened or otherwise prepared for market, and did not impose a similar tax on *bituminous* coal, the answer is that the tax was imposed upon anthracite coal whether mined *etc.* by a *corporate* or by a *non corporate* coal operator. If the tax had been levied on that class of coal only if, as and when mined *etc.* by a *corporate* coal operator, it would have raised the question now before this Court. That case can not possibly justify the statute under attack.

7. The Cases Cited by the Court Below Do Not Sustain its Conclusion.

After stating that the right to classify for the purpose of taxation was well settled Mr. Justice Walling said (R. 38):—

> "Under this right *corporations* may be placed in a class separate from *individuals* and so taxed."

And of the Federal question, he said (R. 38

> "The fourteenth amendment to the U
> States Constitution was not intended to
> pel the state to adopt an iron rule of
> taxation: *St. Louis S. W. Ry.* vs. *Arka*
> 235 U. S. 350, 366; *American Sugar R*
> *ing Co.* vs. *Louisiana*, 179 U. S. 89; *I*
> *Gap Railroad Co.* vs. *Pennsylvania*, 134
> 232; *Knisley* vs. *Cotterel*, 196 Pa. 614."*

These cases, we respectfully submit, are
cally different and do not apply to the case at

In the *St. Louis Southwestern Railway*
pany Case, the statute under consideration w
franchise tax imposed on domestic and for
corporations "for the *privilege* of exercisin
franchise" in the State.

In the *American Sugar Refining Com*
Case, the tax sustained imposed a *license* ta
the manufacturers of refined sugar, but exem
those who refined the products of their
plantations. Not only was this a *license* tax
it was imposed equally upon *corporate* as we

* Professor Henry Wolf Biklé in his review of Dean Hall's
edition of Cases on Constitutional Law, said (58 U. of Pa. L.
Rev. February, 1927): "The [illegible] cases are [illegible]
Supreme Court of the United States [illegible] [illegible]
through no invention of the editor, to perhaps [illegible]
a State court deals adequately with a question of constitution
arising under the Federal Constitution."

non corporate refiners, for as was said by Mr. Justice Brown (page 95):—

> "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to *persons* and *corporations* engaged in the general refining business the equal protection of the laws."

The *Bell's Gap Railroad Company Case* decided only that since there was such a great difference between loans issued by corporations and loans issued by individuals,* that the Legislature could properly classify such loans; the former being taxed on the basis of par value, and the latter on the basis of actual value. That case is not applicable because

1. The *corporate* debtor was not taxed on its loans to the exclusion of the *non corporate* debtor. The tax was assessed on the *resident holder* of the indebtedness, be the holder a corporation or an individual. In the case at bar, however, the tax is assessed on the gross receipts only when received by the *corporate* taxicab operator and is paid only by the *corporate* taxicab operator.

2. In the case at bar, no difference has ever been suggested between the gross receipts re-

* See *Commonwealth vs. Pittsburgh Pleasure Road Company* (1868) 53 Pa. St. 469-472 to this effect.

ceived by *corporate* operators and those received by competing *non corporate* operators.

The *Kinsely Case* dealt with the Mercantile Tax Act of 1899, *supra*, which imposed the tax for the *privilege* of vending merchandise. It sustained the classification of dealers into (1) retail dealers and (2) wholesale dealers with different rates of tax on gross revenue.* But in that case the tax was applied to all dealers, whether they were *corporate* or *non corporate* dealers. It contains no suggestion that even such a *license* tax could be levied upon the gross sales of only the *corporate* dealers.

VI. Conclusion.

While it is true that in some of the cases decided by this Court general expressions can be found to the effect that the 14th Amendment does not impose restraints on the States in regard to taxation, yet they must be read in connection with the precise tax involved. Such cases can not be decided by generalities. What Mr. Justice Holmes said of the police power in *Noble State Bank* vs. *Haskel*, (1910) 219 U. S. 104 is applicable here—the "lines are pricked out by the gradual approach and contact of decisions on the opposing sides." And as stated

* A similar tax classification was sustained in [illegible]

by Mr. Justice Bradley in *Bell's Gap Railroad Company* vs. *Pennsylvania, supra,* no general rule can be laid down "that would include all cases and they must be decided as they arise."

But that the 14th Amendment does impose the restraint for which we contend can not be doubted. The thought is well expressed by Mr. Guthrie: *The Fourteenth Amendment to the Constitution of the United States* (page 118):—

> "The Fourteenth Amendment does impose a practical and effective restraint against such taxes. It requires that the power of taxation, so great and so liable to abuse, shall be exercised impartially and by equal laws, and that taxes shall be imposed proportionately upon *all persons and corporations properly within the same class, owning like property or exercising like rights under substantially similar conditions.*"

The case at bar we believe raises the clear issue which Mr. Justice Field said* in 1886, must be decided "in harmony with the great constitutional Amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

* See *supra*, page 35

This statute can not be applied to Plaintiff in Error and be "in harmony with the great constitutional Amendment." That Amendment requires the judgment of the Supreme Court of Pennsylvania to be reversed.

Respectfully submitted,

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APRIL, 1927.

APPENDIX "A."

Section 23 of the Act of 1 June 1889, P. L. 420, 431 (Pa. Stat. 1920, §20,388) being "A further supplement to an Act entitled 'An Act to provide revenue by taxation' approved the 7th day of June, Anno Domini One Thousand Eight Hundred and Seventy-Nine" provides:—

> "SECTION 23. That every railroad company, pipe line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint stock association or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning, operating or leasing to or from another corporation, company, association, joint stock association or limited partnership, any railroad, pipe line, slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or oil, and every telephone or telegraph company incorporated under the laws of this or any other State or of the United States and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Com-

monwealth, and every firm, co-partnership or joint stock company or association doing express business in this Commonwealth, and every electric light company, and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or co-partnership, received from passengers and freight traffic transported wholly within this State, and from telegraph, telephone or express business done wholly within this State, or from business of electric light companies, and from the transportation of oil done wholly within the State; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, firm, co-partnership, limited partnership, joint stock association or corporation, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said companies, co-partnerships, corporations, joint-stock associations or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July

in each year; and if any such company, firm co-partnership, joint-stock association, association or limited partnership or corporation, shall neglect or refuse for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law: *Provided*, That in any case where the works of one corporation, company, joint stock association or limited partnership are leased to and operated by another corporation, company, association or limited partnership, the taxes imposed by this section shall be apportioned between the said corporations, companies, associations or limited partnerships in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the Commonwealth shall first look to the corporation, company, association or limited partnership operating the works, and upon payment by the said company, corporation, association or limited partnership of a tax upon the receipts as herein provided derived from the operation thereof, the corporation, company, joint stock association or limited partnership from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental for the use of said works."

No. 691.

OCTOBER TERM, 1926.

FILED
APR 11 1927
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

QUAKER CITY CAB COMPANY, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1926. No. 691.

Quaker City Cab Company, Plaintiff in Error,

vs.

Commonwealth of Pennsylvania, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of Pennsylvania. The Plaintiff in Error, Appellant below, is a corporation incorporated under the Laws of the State of New Jersey and is registered to do business in the State of Pennsylvania. It is incorporated, inter alia, for the transportation of passengers and goods by means of cabs, taxicabs, touring cars and limousines. In 1917, The Public

Service Commission granted to it a Certificate of Public Convenience, since which time it has been engaged in carrying passengers and their luggage for hire, in the City of Philadelphia, where it operates some 365 taxicabs and 50 limousines and touring cars. Each cab and car is propelled by its own power and operated on the City Streets by a driver; the amount of fare is regulated by the distance traveled or the time consumed. They have no fixed terminal but some 50 stands throughout the City where they can be found or called by telephone; they also pick up passengers anywhere. (R. 2, 9, 33.)

The Plaintiff in Error filed its report of Gross Receipts for the six months' period ending December 31, 1923, derived from "taxicab and touring car fares," being its receipts from transportation of passengers within the City of Philadelphia, Commonwealth of Pennsylvania, in accordance with the provisions of Section 23 of the Act of June 1, 1889, P. L. 420, in the office of the Auditor General of the Commonwealth of Pennsylvania, upon which a settlement of Tax was made by the Auditor General March 4, 1924 and approved by the State Treasurer March 6, 1924.

From the settlement so made the Plaintiff in Error took an appeal to the Court of Common Pleas of Dauphin County in accordance with the provisions of a General Law of the Commonwealth of Pennsylvania, the Act of March 30, 1811, P. L. 145, 5 Sm. L. 220. A stipulation was filed dispensing with a trial by Jury under the provisions of the Act of April 22, 1874, P. L. 109. The case was heard by the Dauphin County Court. Facts were found. Conclusions of Law made, an opinion rendered and judgment directed to be entered in favor of the Commonwealth for the tax in accordance with the provisions of said Section 23 of the said Act of 1889, supra. (R. 2, 9, 33.)

To the judgment so entered by the Dauphin County Court, the Plaintiff in Error filed Exceptions which Exceptions were overruled and judgment directed to be entered as theretofore ordered. From the judgment so entered by the Dauphin County Court, the Plaintiff in Error took an appeal to the Supreme Court of Pennsylvania, the highest Court of the State, which affirmed the judgment of the Dauphin County Court. To the judgment so entered the writ of error in the instant case was allowed.

In the Dauphin County Court and in the Supreme Court of Pennsylvania, the Plaintiff in Error contended, inter alia, that it was not subject to the provisions of the said Section 23 of the said Act of 1889, supra, because it was not in existence at the time such Act was enacted by the Pennsylvania Legislature, that taxicabs were not known at the time the Act was enacted and that therefore it was not within the intent of the Legislature as expressed in said Section 23. It also contended that it was not within the provisions of the said Section 23 of the said Act by reason of the fact that it did not own, construct or operate upon any fixed right of way, or between fixed termini but used the public highway by right of a Certificate of Public Convenience which granted it the privilege so to do in the City of Philadelphia, and therefore it was not within the class of companies specified in said Section 23 of the said Act of 1889, supra. The Dauphin County Court and the Supreme Court of Pennsylvania held such contentions to be invalid and entered judgment accordingly. The Plaintiff in Error also contended that it was not to be regarded as being within the scope of said Section 23 of said Act of 1889 and not to be regarded as within the intent of the Legislature as expressed in such Section for the reason that it was made subject by other provisions of the Act, to

wit, Sections 14 and 17, to property taxes, and that the Legislature therefore did not intend to make the Plaintiff in Error subject to said provisions of Section 23. Section 14 of the Act of June 1, 1889, supra, (changed by subsequent legislation, to wit, amended by the Act of June 8, 1891, P. L. 229 which latter Act was repealed by the Act of June 17, 1913, P. L. 507, which imposed the Tax in Section 1 thereof), authorized the levy of a local tax on property which the Court held did not result in double taxation by reason of the fact that the Plaintiff in Error was made subject to the provisions of said Section 23, for the reason that the Tax imposed by Section 14 was a local tax on property and the tax imposed by said Section 23 was not a property tax. The Court found as a fact that it nowhere appeared that the Plaintiff in Error had paid the tax provided for in said Section 1 of the Act of 1913, supra. (R. 25) The Plaintiff in Error made various other contentions upon the question of the intention of the Legislature to include it within the terms of said Section 23, such as reports of tax commissions and various proposed amendments to said Section 23 which are not pertinent to the present issue, the Supreme Court of Pennsylvania having construed the said Act of the General Assembly as including the Plaintiff in Error within its terms. The Plaintiff in Error also contended that the Act of Assembly, to wit, Section 23 of the said Act of 1889, supra, was unconstitutional as being in violation of the Uniformity Clause, Section 1 of Article IX of the Constitution of Pennsylvania. The contention made by the Plaintiff in Error upon this point and with reference to the Fourteenth Amendment to the Constitution of the United States is stated in the opinion of the Supreme Court of Pennsylvania (R. 38) in the following language.

"Appellant contends the statute under which the tax was assessed, as construed by the trial court, is unconstitutional as violative of sec. 1 of article IX of the state constitution, which requires uniformity of taxation on the same class of subjects, and also of sec. 1 of the fourteenth amendment to the federal constitution which provides, inter alia, that no state shall 'deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"This contention is based on the assertion that individuals engaged in a like taxicab business are not subject to the tax; whether they are is not shown and in any event is immaterial, as the right to classify for purposes of taxation is well settled. Schoyer et al. v. Comet Oil & Ref. Co., 284 Pa. 188, 198 and cases there cited. Under this right corporations may be placed in a class separate from individuals and so taxed. Com. v. Sharon Coal Co., 164 Pa. 304; Com. v. Brewing Co., 145 Pa. 83; Com. v. Delaware Div. Canal Co., supra, and see Seabolt v. Commissioners, 187 Pa. 318. It is sufficient if all corporations of like character fall within the statute (see Dupuy v. Johns et al., 201 Pa. 40, 48) and it is uniformity of taxation according to the classification made that is required. Com. v. Del. Div. Canal Co., supra; Com. v. Edgerton Coal Co., Ltd., 164 Pa. 284. The fourteenth amendment to the United States Constitution was not intended to compel the state to adopt an iron rule of equal taxation. St. Louis S. W. Ry. v. Kansas, 235 U. S. 350, 360; American Sugar Refining Co. v. Louisiana, 179 U. S. 89; Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232; Knisley v. Cotterel, 196 Pa. 614.

"It would unduly prolong this opinion to discuss all other legislation, which it is claimed affects the construction of that here in question, or to refer to all

the authorities which the industry of able counsel has brought to our attention. We might say, however, that the provisions of the Act of June 15, 1911, which we condemned in Schoyer et al. v. Comet Oil Ref. Co., supra, so far as it gave a different method for the collection of debts due the commonwealth by corporations from those due by individuals, had no reference to classification for purposes of taxation. We find nothing in any of the statutes or authorities cited to create a doubt as to the correctness of the conclusions of the trial court. We have not overlooked the rule that in construing a tax statute the taxpayer must receive the benefit of the doubt (Shwab v. Doyle, 258 U. S. 529, Com. v. Pa. W. & P. Co., 271 Pa. 450), but here we have none. As the emergency profits tax, assessed against defendant for 1923, was remitted by the auditor general, it drops out of the case."

ARGUMENT

Section 23 of the Act of June 1, 1889, P. L. 420, 431, is attacked upon the ground that if it be construed to apply to the Plaintiff in Error, then said Section is void, for the reason that as applied to the Plaintiff in Error, it takes its property without due process of law and denies to it the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States because, as the Plaintiff contends, the tax is imposed upon corporate taxicab operators and not upon noncorporate taxicab operators.

A consideration of the nature and kind of tax which is imposed by said Section 23 of the said Act of June 1, 1889, supra, especially when considered in its relation to other portions of said Act of 1889, and its relation to the

system of taxation involving the policy of law of the Commonwealth of Pennsylvania, will dispose of the objections made by the Plaintiff in Error.

Nature of the Tax.

Section 23 reads as follows:—

"Section 23. That every railroad company, pipe line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint-stock association or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning, operating or leasing to or from another corporation, company, association, joint stock association or limited partnership, any railroad, pipe line, slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or oil, and every telephone or telegraph company incorporated under the laws of this or any other State or of the United States and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Commonwealth, and every firm, co-partnership or joint-stock company or association doing express business in this Commonwealth, and every electric light company, and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or co-partnership, received from passengers and freight traffic transported wholly within this State, and from telegraph, telephone or ex-

press business done wholly within this State, or from business of electric light companies, and from the transportation of oil done wholly within the State; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, firm, co-partnership, limited partnership, joint-stock association or corporation, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said companies, co-partnerships, corporations, joint stock associations or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July in each year; and if any such company, firm, co-partnership, joint-stock association, association or limited partnership or corporation shall neglect or refuse for a period of thirty days after such tax becomes due to make said returns or to pay the same the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law: Provided, That in any case where the works of one corporation, company, joint-stock association or limited partnership are leased to and operated by another corporation, company, association or limited partnership the taxes imposed by this section shall be apportioned between the said corporations, companies, associations or limited partnerships in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the Commonwealth shall first look to the corporation, company, association or limited partnership operating the works, and upon payment by the said company, corporation, association or limited partnership of a tax upon the receipts as herein provided derived from the operation thereof the corporation, company, joint stock association or limited

partnership from which the said works are leased shall not be held liable, under this section, for any tax upon the proportion of said receipts received by it as rental for the use of said works."

This case being brought here from a State Court, the construction put by the Court below upon the statutes and constitution of its own State is not open to review in this Court. This principle of law was reaffirmed in the recent opinion of this Court delivered by Mr. Justice Stone, February 21, 1927, in the case of *Standard Oil Corporation v. Shanks*, No. 148 October Term, 1926, citing Southwestern Oil Co. v. Texas, 217 U. S. 114, 119; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 568.

The Pennsylvania Supreme Court held the Plaintiff in Error to be a transportation corporation, operating a device for the transportation of passengers and their luggage upon the public highways and therefore within the terms of the Section and subject to the tax. It is to be noted that the amount of the tax is to be determined by the application of a fixed rate of eight mills per dollar to the amount of the gross receipts of the company "received from passengers and freight traffic transported wholly within this State". The transportation of passengers or freight or both is the business which the companies named are empowered by law to perform or transact which, in the case of the Plaintiff in Error, is the power granted by its Charter, and, being a foreign corporation, which the State of Pennsylvania permitted it to perform within its borders and for which the Public Service Commission granted it a Certificate of Public Convenience. The sole business of the Plaintiff in Error is that of the transportation of passengers and their luggage solely within the State. To the receipts of such business and to none other was

the rate of taxation applied to determine the amount of the tax. Under the Act if the Plaintiff in Error had had no receipts from such business it would not have been liable for the payment of any tax. Thus it is seen that tax results from the operation or performance of the business of the companies taxed and is graduated in accordance with the amount of the gross receipts resulting from the operation or performance of such business. (R. 2, 6, 33.)

"The Tax," as was said in the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 150, "is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed."

The Plaintiff in Error, contended below that the Act resulted in double taxation, basing such contention upon the tax imposed by Section 14 of the Act (changed by subsequent legislation). The Supreme Court denied this contention pointing out that the tax imposed by Section 14 was not only a property but also a local tax while the tax imposed by Section 23 here under consideration was a State Tax on business or income, by income meaning the income resulting from the operation of the business. The Supreme Court said (R. 38):—

> "Section 14 of the Act of June 1, 1891, P. L. 426 (changed by subsequent legislation), authorizes the levying of a county tax of three mills on the value thereof on 'hacks, cabs and other vehicles used for transporting passengers for hire, except steam and street passenger railway cars.' It is, however, of no moment here whether taxicabs fall within the designation of hacks, cabs, etc., for that imposes a local tax on property, while *section 23 imposes a state tax on business or income*, so it is not double taxation, although such may be imposed by express authority of the

legislature: Com. v. Harrisburg L. & P. Co., 284 Pa. 175." (Italics ours.)

That the tax therefore is not a property tax is clear not only from the language of Section 23 but also by the construction placed upon it by the Supreme Court. This view is further strengthened by the fact that a capital stock tax which is a property tax, is imposed upon such companies under the provisions of Sections 20, 21 of the same Act (changed by subsequent legislation as to the method of computing and determining the account of the tax. See Act of July 22, 1913, P. L. 903, noting particularly the proviso that interest in limited partnerships and joint-stock companies is to be deemed to be capital stock. See also the Act of July 12, 1919, P. L. 948).

The Supreme Court in considering a contention of the Plaintiff in Error that it was not within the classes of companies specified in Section 23 because, as it contended, the term, "transportation company" referred merely to a company engaged in the business of transportation over the lines and facilities of another company, said (R. 35, 36):—

> "The case just cited answers appellant's contention that the words 'transportation company' refer merely to a company carrying freight or passengers over the lines or facilities of another company; and see Monongahela Navigation Co. v. Com., 66 Pa. 81. Again the words 'and every other company' following the designation, inter alia, of 'street passenger railway company' operating any railroad, etc., or other device for the transportation of freight or passengers or oil, shall pay the state treasurer, etc., clearly embrace a taxicab company, which is a company using certain devices, to-wit, motor cars and public streets, for the transportation of passengers. *The real subject of the tax is the gross receipts of a company engaged in the*

> *transportation of freight or passengers* and to hold that the transportation must be on definite tracks and between fixed termini would tend to thwart the manifest purpose of the statute; and that it includes steamboats negatives the contention that it applies only to a carriage upon tracks or between fixed termini. It is difficult to suggest a reason why a railway or street car company transporting passengers from one part of Philadelphia to another should bear a burden from which a taxicab company performing a like service is exempt." (Italics ours.)

It is clear therefore that the tax is a tax upon the business of the companies measured in amount by the gross receipts or income resulting from the conduct and operation of such business. It is a tax upon the doing of a business and in respect to a carrying on thereof, in a sum equivalent to eight mills upon each dollar of the gross receipts received from the transacting or performing of such business. It is not a tax upon the property of the corporation. This is apparent in the light of the fact that the tax is imposed by the Section upon telephone, telegraph, electric light, express companies, the same rate of tax being applied to the gross receipts received from their business, to wit, "telegraph, telephone or express business done wholly within this State, or from business of electric light companies, and from the transportation of oil done wholly within the State, * * *"

Such being the tax, does the Act violate the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States? Does it lack uniformity? The tax is imposed upon both domestic and foreign corporations and is confined to business done solely within the State of Pennsylvania. All within the class specified are treated alike, hence the issue turns upon the power of the State to classify and whether or not the classification made by the Act rests upon a reasonable basis

and is not illusory or arbitrary. Is the particular classification open to objection because it precludes the assumption that it was made in the exercise of legislative judgment and discretion?

Fourteenth Amendment.

The scope of the Fourteenth Amendment to the Constitution of the United States was considered by this Court in the following cases:

The case of the *Bell's Gap Railroad Co.* vs *Commonwealth of Pennsylvania*, 134 U. S. 232; 33 L. Ed 892, brought before the Court the question of the validity of what is known in Pennsylvania as the Loans Tax. Involved in this case was a consideration of the 14th amendment to the Constitution of the United States. The scope of this amendment is clearly set forth in the opinion of the Court as given by Mr. Justice Bradley on page 895:

> "The provision in the XIVth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. * * * We think that we are safe in saying that the XIVth Amendment was not intended to compel the States to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt."

The language of the Court in the above case was cited with approval in the case of the *Merchants & Manufacturers National Bank* vs. *Pennsylvania*, reported in 167 U. S. 461; 42 L. Ed. 236. This latter case was likewise a case involving legislation of the General Assembly of this State, the corrected law being the Act of June 8, 1891, P. L. 240, which taxed, inter alia, shares of stock of national banks. The validity of this statute was called into question. This Court, speaking through Mr. Justice Brewer cited with approval the language of Mr. Justice Williams of the Supreme Court of Pennsylvania, and approved the language of Mr. Justice Bradley in the case of *Bell's Gap Railroad Co.* vs. *Pennsylvania, supra*. This Court said on page 237:

> "It was well said by Mr. Justice Williams, speaking for the supreme court of Pennsylvania, in the opinion in the present case: 'The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them, then, can stand.' Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237 (33: 892, 895) • • •"

In the case of *Magoun* vs. *Illinois Trust & Savings Bank*, 170 U. S. 283; 42 L. Ed. 1037, this Court had before it the question of the validity of the Inheritance Tax Law of the State of Illinois. The Statute was attacked on the grounds that the principles of the law were necessarily arbitrary and that its provisions cause discrimi-

nations and create inequality in the burdens of taxation. The Court asked itself the question as to whether or not the Act was open to such criticism. The Court said on pages 1042, 1043:

> "Is the act open to this criticism? The clause of the 14th Amendment especially evoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Tax Cases, 115 U. S. 321 (29: 414). It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. Hayes v. Missouri, 120 U. S. 68 (30: 578). Similar citations could be multiplied. But what is the test of likeness and unlikeness, of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustrations it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile County v. Kimball, 102 U. S. 704 (26: 242), that this court is not a harbor in which can be found a refuge from ill advised, unequal, and oppressive state legislation. And he observed in another case: 'It is

hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity.'

"The rule, therefore, is not a substitute for municipal laws; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation." (Italics ours.)

In the case of *Keeney* vs. *New York*, 222 U. S. 525; 56 L. Ed. 296, this Court holding that an excise does not become an ad valorem tax on property conveyed because the amount is based on the value of such property and that there need be no great or conspicuous difference in order to justify a classification, said on page 305:

"The validity of the tax must be determined by the laws of New York. The 14th Amendment does not diminish the taxing power of the state, but only requires that, in its exercise, the citizen must be afforded an opportunity to be heard on all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the state of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (New York ex rel. Hatch v. Reardon, 204 U. S. 150, 51 L. Ed. 422, 27 Sup. Ct. Rep. 188), and that it must tax all transfers, or that all must be treated alike."

In the case of *St. Louis S. W. R.* vs. *Arkansas Ex rel. Norwood*, 235 U. S. 350; 59 L. Ed. 265, this Court said on page 273:

"Nothing in the 14th Amendment to the Federal Constitution imposes any iron-clad rule upon the states with respect to their internal taxation, or pre-

vents them from imposing double taxation or any other form of unequal taxation so long as the inequality is not based upon arbitrary discriminations." Citing cases.

In the case of *Maxwell* vs. *Bugbee*, 250 U. S. 525; 63 L. Ed. 1124, this Court had before it the question of the validity of the inheritance tax law of the State of New Jersey. It was contended that the tax bore so unequally upon non-residents as to deny them the equal protection of laws. The Court said on page 1133:

> "The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates whose representatives are here complaining. Absolute equality is impracticable in taxation, and is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."

These principles of law have been declared again and again in subsequent decisions of the Court.

In *Swiss Oil Corporation* vs. *Shanks*, No. 148 October Term, 1926, in an Opinion delivered by Mr. Justice Stone, February 21, 1927, this Court said,

> "Unlike the state constitution, Dawson v. Kentucky Distilleries Co., 255 U. S. 288; Greene v. Louisville & Interurban R. R., 244 U. S. 499, the Fourteenth Amendment does not require uniformity of taxation, Davidson v. New Orleans, 96 U. S. 97, 105, nor forbid double taxation. St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 367, 368; Shaffer v. Carter, 252 U. S. 37, 58; Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 533; cf. Fidelity & Columbia Trust

Co. v. Louisville, 245 U. S. 54, 58; Cream of Wheat Co. v. Grand Forks Co., 253 U. S. 325; Citizens National Bank v. Durr, 257 U. S. 99, 100. It is sufficient, as stated, that there be some adequate or reasonable basis for the classification. Kidd v. Alabama, 188 U. S. 730, 733; Watson v. State Comptroller, supra, 124, 125; Maxwell v. Bugbee, 250 U. S. 525, 540; Northwestern Life Ins. Co. v. Wisconsin, 247 U. S. 132, 139; Coulter v. Louisville & Nashville R. R., 196 U. S. 599, 608, 609. The particular classification adopted "is not open to objection unless it precludes the assumption that [it] was made in the exercise of legislative judgment and discretion." Stebbins v. Riley, 268 U. S. 137, 143."

With these principles in mind let us consider the statute and the tax imposed by it in the light of decided cases.

Decided Cases.

The question is one of classification for tax purposes. Is the selection of corporations, joint stock companies, limited partnerships and companies, both domestic and foreign, engaged solely in intrastate business, exercising no Federal right and there being no employment by the Federal Government, individuals not included, arbitrary and not based upon any reason or policy of taxation. Does such selection "preclude the assumption that it was made in the exercise of legislative judgment and discretion" (Swiss Oil Corporation v. Shanks, supra)? Is such a selection or classification in violation of the "due process" and "equal protection" clauses of the Constitution of the United States? Is a foreign corporation which is included in the above named class and which has been granted permission to conduct and engage in its business within the State of Pennsylvania upwards of twenty-eight years after

the passage of the law imposing the tax, denied "due process of law," and the "equal protection of the laws" guaranteed by the Fourteenth Amendment to the Constitution of the United States because, as it alleges, individuals, that is to say, natural persons, and common law partnerships are not included within said class? As to this allegation see the Findings of Fact by the Dauphin County Court and affirmed by the Pennsylvania Supreme Court (R. 20, 38).

Pertinent here is the argument of the Solicitor General for the United States in the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 140, in which case the tax imposed by the Act of Congress there under consideration by this Court was held to be a tax with respect to the carrying on or doing business by corporations, joint stock companies, or associations or insurance companies, and that the tax was imposed not upon the franchises of the corporation irrespective of their use in business, "*nor upon the property of the corporation*, but upon the doing of corporate or insurance business and with respect to the carrying on thereof." The Solicitor General argued, inter alia, as follows (page 140):—

> "The real question presented by the corporation tax is that of discrimination. Is the selection of corporations, individuals, and partnerships not being included, arbitrary and unjust?
>
> "Government may tax one calling and leave another free, and so it may and does select between different species of property, and great freedom must be allowed in this respect. Connolly v. Union Sewer Pipe Co., 184 U. S. 540.
>
> "We lay an excise upon liquor and tobacco and not upon bread and meat, and there is here a purpose of discrimination, but that does not avoid the tax. We may select the objects of taxation for various reasons.

convenience of collection, relation to ability to pay, discouragement of use, or whatever other reason may commend itself to the judgment of the lawmaker.

"So we discriminate between callings. We may tax the doctor and exempt the lawyer, tax the shoemaker and leave the tailor free. We impose an excise upon the travelling vender and exempt the merchant with a fixed place of business. During the Civil War we differentiated peddlers into four classes, the first class being those who drove a four-horse van, and the fourth those who carried their packs upon their shoulders. We may fix such a tax at an arbitrary sum, or we may measure it by capital, or by the volume or the profits of the business.

"Then why may we not discriminate in taxation between the corporation and the individual? The familiar illustration of the illegality of discrimination between the brown-haired and the red-haired man, the Protestant and the Catholic, is presented, but it is not to the purpose. We hold all men to be created equal, and to stand as equals before the law. In the differences of complexion and of creed there is nothing that has the attributes of property, nothing that makes for pecuniary gain, nothing related to the ability to bear the burdens of government.

"Corporate powers and privileges are not like complexion and creed. They do have the attributes of property, they do make for gain, they do have relation to the ability to bear the burdens of government. And so they may be taxed as any other species of property, and a business conducted with their aid may be subjected to an excise when the same business conducted without their aid is left free."

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, supra, the Court considered the Act of Congress imposing a tax in the following language:

"Sec. 38. That every corporation, joint stock company or association organized for profit and having a

capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska and the District of Columbia, during such year, exclusive of amounts so received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed."

This Court said (pages 145, 146),

"It is therefore apparent, giving all the words of the statute effect, that *the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof*, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year, that is, when imposed in this man-

ner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization *it may be described generally as a tax upon the doing of business in a corporate capacity*. In the case of the insurance companies the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any State or Territory, as heretofore stated.

"This tax, it is expressly stated, is to be equivalent to one per centum of the entire net income over and above $5,000 received from all sources during the year—this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock of other corporations, joint stock companies or associations, or insurance companies also subject to the tax. *In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source.*" (Italics ours.)

Many contentions were made attacking the validity of this law and the lack of power in Congress to enact it. It is pertinent to the instant case to note that the classification was that of corporations and joint stock companies or associations organized for profit and having capital stock represented by shares and every insurance company now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under

the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, such and such only were made subject to the annual tax imposed

This Court held that "the mere fact that the business taxed is done in pursuance of authority granted by the State in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges." It is to be noted that when, as in the Pennsylvania Act here under consideration in the instant case, the tax is imposed upon both domestic and foreign corporations doing business in the State, it was held by this Court in *Horn Silver Mining Co* v. *New York*, 143 U. S. 305, that as to a franchise tax or tax upon the business of every corporation doing business in the State there can be no question as to their validity; that a foreign corporation was likewise subject to the tax, for "it can claim a right to do business in another State, to any extent, only subject to the conditions imposed by its laws" (supra, 313, 314)

Turning to the consideration of a contention made against the validity of the Act of Congress (*Flint* v. *Stone Tracy Co.*, supra) upon the ground of the classification being unequal and arbitrary as to the class subjected to the tax and the subject selected for taxation this Court said (pages 158-161):

> "But, it is insisted, this taxation is so unequal and arbitrary in the fact that it taxes a business when carried on by a corporation and exempts a similar business when carried on by a partnership or private individual as to place it beyond the authority conferred upon Con-

gress. As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States. This subject was fully discussed and set at rest in Knowlton v. Moore, 178 U. S. 41, supra, and we can add nothing to the discussion contained in that case.

"*In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another. For examples of such taxation see cases in the margin, decided in this court, upholding the power.*

"Many instances might be given where this court has sustained the right of a State to select subjects of taxation, although as to them the Fourteenth Amendment imposes a limitation upon state legislatures, requiring that no persons shall be denied the equal protection of the laws. See some of them noted in the margin.

"In Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, dealing with the Fourteenth Amendment, which in this respect imposes limitations only on state authority, this court said:

"'The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in

a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution'" (Italics ours.)

After distinguishing *Southern Ry. Co. v. Greene*, 216 U. S. 400, this Court said with reference to the Fourteenth Amendment (pages 161, 162):

"In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of tax-

ation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals." (Italics ours.)

In the Pennsylvania Act the tax is limited and confined to the gross receipts received from the operation and conduct of the particular business which the corporation was incorporated to conduct, which in the instant case was "the gross receipts of the said corporation, * * * received from passengers and freight traffic transported wholly within this State." Thus it is seen that the Pennsylvania tax is limited and confined to the precise business for which the companies made subject to the tax were created and were permitted to transact within the borders of the State, the Plaintiff in Error being required further to secure from the Public Service Commission of the State a Certificate of Public Convenience to use the public highways as prescribed in such certificate and the law authorizing its issue (Act of July 26, 1913, P. L. 1374.) With greater force, therefore, is the quoted language of this Court pertinent to the instant case. The tax under the Pennsylvania Act is not payable by the corporation unless it is carrying on or doing business in the designated capacity of a transportation company, and as was said by this Court in the last cited case, "this is made the occasion for the tax measured by the standard prescribed," and if there be no receipts from such corporate activity there is no tax.

Is this not conclusive in the instant case? The Plaintiff in Error rests its case solely upon the contention that individuals, and unincorporated taxicab operators not being made subject to the tax, the Act falls. The case just considered negatives such contention. (Note the Findings by the Court (R. 20, 28).)

Having in mind the facts that the Plaintiff in Error is a foreign private corporation incorporated under the laws of

the State of New Jersey and is engaged solely in an intrastate business in Pennsylvania and that it is taxed, as are domestic corporations, solely with reference to the receipts of such business and in the same manner as domestic corporations and that therefore the State of Pennsylvania had the power to exclude it from the operation of its business within the State (*Hooper v. California*, 155 U. S. 648); and therefore the power to prescribe the conditions and limitations of its business operations within the State and that the present law was an ingredient of the Pennsylvania system of taxation many years prior to the entrance of the Plaintiff in Error to Pennsylvania, especially pertinent is the language of this Court in *Crescent Oil Co. v. Mississippi*, 257 U. S. 129, 137. The Plaintiff in Error had been engaged in its business in Mississippi before the law in question was enacted, yet this Court said,

> *"Where, as we have found in this case, a foreign corporation had no federal right to continue to do business in a State, and where, as here, no contract right is invested and there is no employment by the Federal Government, it is the settled law that a State may impose conditions, in its discretion, upon the right of such a corporation to do business within the State, even to the extent of excluding it altogether. Horn Silver Mining Co. v. New York, 143 U. S. 305; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 343, 344; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85. And see Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 533; American Sugar Refining Co. v. Louisiana, 179 U. S. 89; Williams v. Fears, 179 U. S. 270, 276; W. W. Cargill Co. v. Minnesota, 180 U. S. 452.*

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the State in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils. It is clearly settled that any classification adopted by a State in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, and cases cited; Kast v. Van Deman & Lewis Co., 240 U. S. 342." (Italics ours.)

In the case of *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, this Court had before it for consideration a tax upon the corporate franchise or business of every corporation, joint stock company or association incorporated under the law of that State or any other State, to be computed upon a percentage of its capital stock. This statute when applied to a manufacturing concern organized under the laws of a State, other than New York, and doing the greater part of its business outside of the State of New York and paying taxes in States other than New York, but doing a small part of its business in the State of New York, was held not to tax persons or property not within the State, nor to regulate interstate commerce, nor to take private property without just compensation, nor to deny to the corporation the equal protection of the laws, nor to impose a tax beyond the constitutional power of the State, and that the remedy of the corporation against hardship and injustice, if any has been suffered, must be

sought in the legislature of the State. This Court said, inter alia, after pointing out that a corporation was a mere creature of the legislature, its rights, privileges and powers being dependent solely upon the terms of its charter, and pointing out the value of the right, privilege or franchise of being a corporation, said that the State had full authority to impose conditions upon its grant as well as its continued exercise by the payment of a specific sum to the State each year or a portion of the gross receipts resulting from an exercise of the business of the corporation. The Court said (p. 313, 314):—

> "There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. *Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation—and all corporations in States other than the State of its creation are deemed to be foreign corporations—it can claim a right to do business in another State, to any extent, only subject to the conditions imposed by its laws.*" (Italics ours.)

Referring to the case of *Paul v. Virginia*, 8 Wall. 168, 181, this Court reaffirmed the doctrine that the State may exclude the foreign corporation entirely, may restrict its business to particular localities or may exact such security for the performance of its contracts with its citizens as in its judgment will best promote the public interest, the whole matter resting in its discretion.

It is pertinent to note what this Court said in *Horn Silver Mining Company vs. New York, supra*, with reference to the imposition of a business tax or a franchise tax upon a corporation as expressly negativing what was

said in the earlier case of *Phila. Steamship Co. v. Penn sylvania*, reported in 122 U. S. 326, 343, wherein it w said (page 342) "It certainly could not have been intend as a tax on the corporate franchise, because, by the ter of the Act, it was laid equally on the corporations of oth states doing business in Pennsylvania." In this latter ca the statute was held to regulate interstate and foreign co merce and therefore to be in conflict with the exclus powers of Congress under the Constitution. No such que tion is involved in this instant case. (See pages 30 to of this Brief.)

Both of the cited cases *Paul v. Virginia, supra*, a *Horn Silver Mining Co., supra*, were cited with appro in the case of *New York State v. Roberts*, 171 U. 658, 661, in the following language:—

> "The construction put upon the statute of the St of New York by its courts is, of course, binding up this court, and that portion of the contention wh questioned the action of the Comptroller on the grou of a misinterpretation of the law is thus disposed
>
> "It must be regarded as finally settled by freque decisions of this Court that, subject to certain limit tions as respects inter-state and foreign commerce, State may impose such conditions upon permitting foreign corporation to do business within its limits it may judge expedient; and that it may make t grant or privilege dependent upon the payment of specific license tax, or a sum proportioned to the amo of its capital used within the State."

In this case the statute of New York applying as it d to every corporation, joint stock company or associati domestic or foreign, excepted from its provisions savi banks, life insurance companies, various other compan including manufacturing or mining corporations or co

panies wholly engaged in carrying on manufacture or mining ores within the State, imposed a tax upon the franchise or business of such corporations, joint stock companies and associations not excepted from the provisions of the Act, graded according to their annual dividends. This Court holding that there was no purpose disclosed in the statute either to distinguish between domestic or foreign corporations to the detriment of the latter or to subject property outside of the State to taxation, it having been said that the operation of that portion of the taxing law "which exempts from a business tax corporations which are wholly engaged in manufacturing within the State of New York, is to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York," said, "such may be the tendency of the legislation but so long as the privilege is not restricted to New York corporations it is not perceived that thereby any ground is afforded to justify the intervention of the Federal Court."

In the case of *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 569, the Act under consideration imposed a License Tax at a rate of one and one-quarter cents per gallon upon those engaged in the business or occupation of rectifying or blending Spirits. The tax was assailed upon the ground that it was a property tax not assessed upon similar classes of property whether produced within or without the State, and that its imposition resulted in a denial of the equal protection of the laws. This Court held that the reasonableness of the classification is the ultimate question to be determined whether the tax be regarded as a license or property tax, and thereupon upheld the statute in question as based upon a classification which was neither arbitrary nor unreasonable.

In the case of *Southwestern Oil Co. v. Texas*, 217 U. S. 114, this Court had before it for consideration a statute of the State of Texas, which imposed an occupation tax upon wholesale dealers in coal and other mineral oils. The statute was upheld despite the fact that other wholesale dealers in other commodities were not taxed. The tax was an annual tax of two per cent upon the gross receipts from any and all sales in the State and an annual tax of two per cent of the cash market value of any and all of said articles that may be received or possessed or handled or disposed of in any other manner than by sale in the State. In discussing the contention that the statute by imposing a tax on *wholesale dealers* in coal oil, naphtha, benzine and mineral oils refined from petroleum and all other mineral oils, while omitting to put any such tax whatever on wholesale dealers in other articles of merchandise, so discriminates against wholesale dealers in the several articles specified as to deny them the equal protection of the laws, this Court said,

> "This view gives to the Amendment a scope that could not have been contemplated at the time of its adoption. The tax in question is conceded to be an occupation tax simply. It was imposed under the authority of the state constitution. * * * It is not questioned that the State may classify occupations for purposes of taxation. In its discretion it may tax all, or it may tax one or some, taking care to accord to all *in the same class* equality of rights. *The statute in respect of the particular class of wholesale dealers mentioned in it is to be referred to the governmental power of the State, in its discretion, to classify occupations for purposes of taxation.* The State, keeping within the limits of its own fundamental law, can adopt any system of taxation or any classification that it deems best by it for the common good and maintain

nance of its government, provided such classification be not in violation of the Fourteenth Amendment." (Italics ours.)

The Court then cited with approval Bell's Gap Rd. Co. v. Pennsylvania, 134 U. S. 232, 237; Home Ins. Co. v. New York, 134 U. S. 594; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 562 and numerous other authorities. In *Home Ins. Co. v. New York*, supra, involving the constitutional validity of a law taxing corporate franchises and businesses, the Court held that the statute was not a denial of the equal protection of the law saying, that the Amendment

> *"Does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property. Nor does the Amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it, and when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."* (Italics ours.)

This was said with reference to a tax upon the business of the corporations, joint stock companies and associations

made subject to the tax, the amount of which tax is measured by the rate per cent applied to the par value of the capital stock, dependent upon the dividend made or declared during the particular year. As to the method of determining the amount of the tax, this Court in this opinion expressly approved the application of a rate to the gross receipts.

In the case of *Pacific Express Co. v. Seibert*, 142 U. S. 339, this Court held that the State statute which defines an express company to be persons and corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies, does not invidiously discriminate against the express companies defined by it and in favor of other companies or persons carrying express matters on other conditions or under different circumstances. The statute required the express company defined therein annually to make a statement to the State Auditor, showing the entire receipts for business done within the State, allowed deductions in certain cases and expressly provided that nothing contained in the Act was to be regarded as releasing such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed. Upon such statement being made the company was required to pay to the State the sum of $2.00 on each $100.00 of such receipts. After holding that the tax imposed did not interfere with interstate commerce, the Court considered the contention made that the Act violated the requirements of uniformity and equality of taxation prescribed by the Constitution of Missouri and thereby denied to the Complainant an equal protection of the laws of the State which the Fourteenth Amendment to the United States Constitution guarantees. This Court said (p. 351):—

"This Court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

In the case of *Metropolitan Street Ry. Co.* vs. *New York*, 190 U. S. 1, this Court held that the difference between surface street railroads and sub-surface street railroads is sufficient to justify classification in the mode and extent of taxation, and a tax otherwise legal on surface street railroad franchise does not deprive the owners thereof of the equal protection of the laws because sub-surface street railroad franchises are not subjected to a similar tax. This Court said in this case (p. 47) —

"With regard to the third contention, it may be said that there is a *difference between surface and sub-surface street railroads sufficient to justify a diversity in the mode and extent of taxation.* In Savannah &c. Railway Company v. Savannah, 198 U. S. 392, just decided, taxation of a street railroad was challenged on the ground that a steam railroad which ran into the City and along its streets, and there did some of the same kind of work as the ordinary street railroad, was not subject to the same tax, and, referring to this contention, is this declaration by Mr. Justice Holmes: 'The difference between the two railroads is obvious and warrants the diversity in the mode of taxation.'" (Italics ours.)

In view of the foregoing it is clear that the tax imposed upon corporations such as the Plaintiff in Error by a state statute applying equally and uniformly upon both domestic and foreign corporations, the tax being upon the business of such corporation measured and determined in amount by the application of a rate per centum or a specified number of mills per dollar of the gross receipts of the corporation received from the transaction and conduct of its business done solely within the State, is a valid tax and is imposed by a statute which does not violate the "due process" or "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

An analysis of the contentions of the Plaintiff in Error discloses that they are predicated solely upon the premise that the tax is a property tax, clearly an erroneous conclusion; a conclusion which if it were sound would not invalidate the statute in its application to the Plaintiff in Error.

Contentions of Plaintiff in Error

Plaintiff in Error rests its case upon the proposition that the tax in question is a property tax not imposed upon natural persons and therefore as to it, a foreign private corporation, permitted by the State of Pennsylvania to engage in its business of the transportation of persons and their goods or luggage within the State and granted a Certificate of Public Convenience to engage in its business by the use of the public highways, such business being wholly within the State of Pennsylvania, which permission to engage in such business within the State was granted to it in 1917, at which time the taxing statute had been in force a period of twenty-eight years, the Act of the General Assembly of Pennsylvania imposing the tax denies to

it that "due process of law" and "the equal protection of the laws" guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

In support of this proposition Plaintiff makes two contentions,

1. The tax is a property tax and therefore the classification for purposes of taxation is invalid.
2. The tax is a property tax not peculiar to corporations.

To the proposition of the Plaintiff in Error, the Commonwealth replies that,

1. The Classification for purposes of taxation made by the Act of Assembly is valid, applying as it does to both domestic and foreign private companies doing business in the State, such business being solely intra state, there being no discrimination between members of the class, all within the class being treated with uniformity and equality, and the amount of the tax being determined by the application of a uniform rate to the gross receipts resulting from transportation activities solely within the State.
2. That the classification is valid whether the tax imposed be regarded as an excise or a property tax; whether the tax be regarded as a tax upon the business of the companies, their activities in the State, or a tax upon the franchise or privilege of doing the business in the State or as a property tax.
3. The Act having been held to apply to the Plaintiff in Error by the Supreme Court of Pennsylvania and held not to violate the Uniformity Clause of the State Constitution (Section 1, Article 9) or the "due process" and "equal protection" clauses of the Constitution of the United States, the construction placed upon the Act and the Constitution of the State by the State Court is accepted by this Court.

4. The Pennsylvania Supreme Court has construed the Act to impose a tax upon the intra state business of transportation of passengers and freight, the amount of tax being measured by the amount of the gross receipts received from such business, the same to be reported by the companies semi-annually.

5. The tax imposed by Section 23 of the Act of the General Assembly of Pennsylvania approved June 1, 1889, Pamphlet Laws, 420, 431, does not deprive the Plaintiff in Error of that due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The Plaintiff in Error contending that the tax imposed by the Pennsylvania Act is a tax upon property and therefore invalid, cites numerous cases in alleged support of its contention. It appears that the Plaintiff in Error admits the validity of the statute if the tax imposed is not a property tax. Repeatedly is it said that the tax is a tax upon property (Brief for Plaintiff in Error, pages 12, 17, 19, 30). On page 19 of its Brief it is written,

> "It is a general property tax imposed on the gross receipts as such derived from passengers transported."

On page 30 of its Brief Plaintiff in Error says,

> "The statute under consideration imposes a general tax upon the gross receipts as property."

In the marginal note on page 22 of its Brief, Plaintiff in Error, cites *Spreckels Sugar Refining Company* vs. *McClain*, 192 U. S. 397, and quotes this Court as follows,

> "Clearly the tax is not imposed upon the gross annual receipts *as property*, but only in respect of the carrying on the business of refining sugar."

What other than this latter does the Pennsylvania Act do? The rate of tax is applied to the gross receipts received from the transportation of passengers and freight which is the sole business of the Plaintiff in Error, the business for which it was incorporated in the State of New Jersey, the business which it is doing in Pennsylvania and for the doing of which upon and by the use of the public streets it was granted a Certificate of Public Convenience by the Public Service Commission of Pennsylvania. If there be no gross receipts from transportation wholly within the State there is no tax. There is no tax payable unless there is a carrying on or doing of business in the designated capacity.

In *Spreckels Sugar Refining Co. v. McClain*, supra, in considering an Act of Congress imposing a tax upon gross receipts at the rate of one-quarter of one per centum on the gross amount of all receipts in excess of two hundred and fifty thousand dollars, this Court in denying the validity of a contention that such tax was a direct and a property tax said, (page 411), "*Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts.*" (Italics ours.)

Plaintiff in Error cites on page 18 of its Brief the case of *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326, wherein the Pennsylvania Act of March 20, 1877, P. L. 6, was under consideration by this Court and argues that by virtue of this decision the present Act, Section 23 of the Pennsylvania Act of June 1, 1889, P. L. 420, 431, must be held to impose a property tax and not an excise tax, quoting from the opinion on page 342. The said

Act of 1877 imposed a tax upon transportation companies, both foreign and domestic, doing business in the State and operating devices for the transportation of freight or passengers or in any way engaged in the business of transporting freight or passengers, and every telegraph, express, palace car and sleeping car company, both foreign and domestic, doing business in the State, the tax being eight-tenths of one per centum upon the gross receipts of the transportation companies for tolls and transportation, and eight-tenths of one per centum upon the gross receipts of telegraph and express companies for telegraph and express business.

The similarity of this Act to Section 23 of the Act of 1887 as to the companies taxed, the rate of the tax, and the measure of the tax by the gross receipts is apparent and its dissimilarity is equally apparent in that it applied to the gross receipts received from business intrastate, interstate and foreign, while the Act of 1887 applies solely to gross receipts from intrastate business. Because it applied to foreign and interstate business the Act of 1877 was held to be a regulation of interstate and foreign commerce and therefore to be in conflict with the exclusive powers of Congress to the extent of the receipts received from interstate and foreign business. This Court considered the earlier cases of *Case of the State Freight Tax*, 15 Wall. 232 and *State Tax on Railway Gross Receipts*, 15 Wall. 284, distinguished between them and the decisions therein and the case then before it. In considering the nature of the tax imposed by the Act of 1877, this Court said that "The tax in the present case is laid upon the gross receipts for transportation as such," (page 341) and that "They are taxed not only because they are money but because they were received for transportation," (page 342), and there-

fore because such tax regulated interstate and foreign commerce, to the extent the tax was applied to receipts so received, the Act violated the Constitution. Directing attention to the fact that not all of the receipts were subjected to the tax, this Court said, "this is not an income tax on the class to which it refers but a tax on their receipts for transportation only." (345.)

Thus it is seen that this Court did not regard such tax as a property tax. On the contrary, instead of holding the tax to be upon property, it held the direct opposite, to wit, a business tax and because it taxed the business of interstate and foreign commerce, to the extent that it did so, the Act was unconstitutional. This Court said it was not a tax upon the franchise of the corporation granted to it by the State, saying, "It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the Act, it was laid equally on the corporations of other states doing business in Pennsylvania." This view however, was not adhered to in later cases but the contrary was held in *Horn Silver Mining Co. vs. New York*, 143 U. S. 305, 313, 314; *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 355, discussed on pages *23, 28, 29, 30* of this Brief.

In the case referred to in this opinion, *State tax on Railway Gross Receipts* 15 Wall. 284, this Court considered the Pennsylvania Act of February 23, 1866, P. L. 82 which imposed a tax upon domestic transportation companies which were not liable to the tax upon income under existing laws, measured by the amount of semi-annual gross receipts and said, (294) "the tax is upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised." It is to be noted that there were no limitations upon the sources of the gross receipts under Act of 1866. The tax was sustained by

this Court as not burdening or interfering with interstate commerce (which was the question at issue) because held to be "laid upon a fund which has become the property of the company, mingled with its other property and possibly expended in improvements or put out at interest." The view as to "a fund" was questioned in Philadelphia Steamship Co. v. Pennsylvania, supra. These decisions negative the contention of the Plaintiff in Error.

These decisions of this Court construing the Pennsylvania Acts of 1866, 1877, 1879 and the Acts themselves establish the fact that the tax imposed by Section 23 of the Act of 1889, *supra*, under consideration in the instant case is a tax which is a part of the system and in accord with the policy of taxation in Pennsylvania.

Pertinent here is the case of Commonwealth v. Delaware Division Canal Co., 123 Pa. 504, wherein the Supreme Court of Pennsylvania had before it for consideration an Appeal under the Act of 1811 from the settlement by the Auditor General and the State Treasurer against the Company for State Taxes. This Act of 1811 is the Act of March 30, 1811, 5 Sm. L. 230, which is a general law of the State providing for appeals from settlements of State taxes and is the Act under which the Plaintiff in Error in the instant case took its appeal. In this case the subject of the power to impose taxes for the support of the Government, the selection of the subjects, their classification and the methods of collection, all within the legislative power, were considered and discussed. The opinion is also pertinent as setting forth the law of Pennsylvania and the policy and system of taxation in the State. The Pennsylvania Supreme Court said (pages 620-623):

> "The new constitution does not withdraw the power of classification from the legislature. Kitty Roup's

Case 81* Pa. 211; Kittanning Coal Co. *v.* Commonwealth, 79 Pa. 100; indeed, the power is necessarily implied in the constitutional provision to which the fourth section of the act of 1885 is supposed to be obnoxious. The power to impose taxes for the support of the government, subject to the limitations of the constitution, still belongs to the legislature; the selection of the subjects, their classification, and the methods of collection are purely legislative matters. When the action of the legislature, with respect to these matters, is not repugnant to the constitution, it would certainly be a case of the grossest inequality, which would call for the intervention of the courts: Kelly *v.* City of Pittsburgh, 85 Pa. 170. It may be conceded, however, that classification should be made according to some reasonable, practical rule, drawn from experience, which would prevent a gross inequality in the burdens of taxation. 'It must,' in the language of Mr. Justice Agnew, 'visit all alike in a reasonably practicable way, or which the legislature may judge, but within the just limits of what is taxation.'

"Absolute equality is of course unattainable; a mere approximative equality is all that can reasonably be expected. A mere diversity in the methods of assessment and collection, however, if these methods are provided by general laws, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, however different the procedure, there is a compliance with the constitutional provisions: Fox's App., 112 Pa. 353; even when there may be some disparity of results, if uniformity is the purpose of the legislature, there is a substantial compliance: Hunter's App., 18 W. N. 411, 304; Loughlin's App., 19 W. N. 517. Nor is classification necessarily based upon any essential differences in the nature or, indeed, the condition of the various subjects; it may be based as

well upon the want of adaptability to the same method of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results, or it may be based upon well-grounded considerations of public policy.

"Hence it is that some classes of corporations are taxed upon net earnings, or income, others upon capital stock, the value thereof to be ascertained by their annual dividends, or in a certain event upon the actual value of the shares, others upon their gross receipts, insurance companies upon the gross amount of their premiums, coal and mining companies at a specific sum for every ton of coal mined, etc.

"Real Estate, for taxation, has been classified as seated and unseated, and for municipal purposes may perhaps admit of further classification: Kitty Koup's Case, supra. Collateral inheritances are distinguished from those that are direct, the former being subject to taxation, the latter not. Foreign insurance companies have been distinguished from domestic companies, and taxed independently and differently: Germania Ins. Co. v. Commonwealth, 85 Pa. 515. So, trades, professions, callings, and even single men have been taxed by classification, and it has been said that professional men may be classified as physicians, lawyers, clergymen, etc.; tradesmen as merchants, mechanics, etc., and other persons as bankers, manufacturers, etc., and a uniform tax assessed upon each class: Banger's App., 108 Pa. 70. Not only have taxes been laid in all these various forms, rated on values, on dividends or profits, on premiums, on net earnings, and on gross receipts, but also by specific sums on specific articles. The road bed, station houses, rolling stock and equipments of a railroad company, the canal bed, and berm banks, the locks, lock houses, etc., of a canal company, etc., are withdrawn from the ordinary processes of general taxation and are

reached in a tax upon capital stock, which has always been regarded as a tax upon the property and assets. These several classifications and departures from uniformity in methods, were intended simply to bring about a just uniformity in results. So, places of amusement and the luxuries of life may be taxed in relief of the necessaries. Household and kitchen furniture, gold and silver plate, exceeding a certain value, pleasure carriages, and gold and silver watches, kept for use, prior to the act of May 13, 1887, P. L. 114, were selected from the like articles in trade, and from other articles of personal property, and with money at interest, were subject to a special tax. Illustrations might be multiplied to show that classification does not depend upon differences in the physical nature or condition of the subjects selected, but upon a variety of considerations." * * * "The moment we concede the power to classify we have disposed of the question of uniformity, for then all that is required by the constitution is that the taxes shall be uniform upon the members of a class." Kitty Roop's Case, supra. Classification for purposes of taxation, as a general rule, is a matter for the legislature; it is the uniformity of taxation, according to that classification, which is for the courts. * * *."

While Acts have been passed since the date of this decision changing in some degree the subjects of tax, yet the principles and policy of the law of taxation in Pennsylvania are fairly outlined in this decision. (See *Commonwealth v. Sharon Coal Co.*, 164 Pa. 304, *Commonwealth v. Brewing Co.*, 148 Pa. 84; *Seabolt v. Commissioners*, 187 Pa. 418.) It is a significant thing that while the tax upon the business of certain classes of corporations measured by their gross receipts has been in force in Pennsylvania many years and several of the statutes imposing such tax have been before this Court (see *State Tax on Railway Gross Receipts*, 15 Wall. 284, *Philadelphia Steamship Co. v.*

Pennsylvania, 122 U. S. 326), it does not appear that any such contention was made as is made in the instant case. The business of transportation undoubtedly was first engaged in and conducted by natural persons as it is to-day. When artificial entities were created with express power to engage in such businesses natural persons continued to engage therein and were in competition with them. Railroad, canal, steamboat, street passenger railway, express and other companies are and have been in competition with natural persons and yet we find no case where such companies have viewed the classification as invidious because natural persons were not included therein. These corporations have recognized and accepted the obvious distinction between natural persons and artificial beings as a just basis of classification for taxation purposes. Indeed in the instant case we find the Plaintiff in Error, a foreign private corporation, coming into the State many years after the passage of the Act of 1885, knowing it to be the law of the State and with the State's permission engaging in transportation business upon the public highways solely within the State, functioning under a Certificate of Public Convenience, in direct and immediate competition with railroad and street passenger railways, claiming an exemption from the statute and contending that the law is discriminatory as applied to it because, as it alleges, natural persons are not included in the same class as artificial entities which exist and engage in business under power granted by the State and by its permission. The hereinbefore cited decisions of this Court have clearly recognized the power of the State to fix the conditions under which foreign corporations such as the Plaintiff in Error may function within the borders of the State and have declared that a classification such as is made in the Act of 1885 is

imposing such a tax, applying as it does to both domestic and foreign corporations, is valid and violates no provision of the Fourteenth Amendment.

Authorities invoked to support an argument that a tax on an incident or function of property is a direct tax upon the property itself simply show that the States cannot, directly or indirectly burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies or instrumentalities employed by the States in the exercise of their power. Such doctrine is not applicable to nor does it in any way affect the instant case. Assuming for the purpose of argument that the tax imposed is a tax upon property, how stands the case of the Plaintiff in Error? It appears that the authorities cited by it not only do not support its contention but on the contrary expressly negative it.

Plaintiff in Error cites the case of *Fort Smith Lumber Company* vs. *Arkansas*, 251 U. S. 532, as a case supporting its contention, a case which it says is "typical" of the line of cases sustaining a classification which distinguishes between corporations and individuals imposing the tax upon corporations and not upon individuals, the Plaintiff in Error contending that the tax imposed was a capital stock tax, a tax peculiar to corporations, and therefore a valid classification but not pertinent to the instant case. It is to be noted that the tax imposed by the Statute of Arkansas was a direct tax upon property and that the subject of the tax, the property upon which it was imposed, was not the capital stock of the corporation but shares of stock owned by the corporation taxed in other domestic corporations and that such tax was not imposed upon shares of stock of the same or similar corporations when owned by individuals. That shares of stock are a distinct species of property and subject to tax as such at the domicil of the

owner and that the owner of the shares of stock is not the owner of the corporation's property is settled law. (*Rhode Island Hospital Trust Company* vs. *Doughton*, 270 U. S. 69, *Hanley* vs. *City of Malden*, 232 U. S. 1, 58 L. ed. 477; *Comm.* vs. *Sunbury Converting Works*, 286 Pa. 545.) That a tax upon the capital stock is a property tax and that a tax imposed upon the capital stock of a corporation is a tax upon the assets which enter into the determination of the value of the capital stock taxed is likewise settled law. This Court so held expressly in *Delaware, Lackawanna & Western R. R. Co.* vs. *Commonwealth of Pennsylvania*, 198 U. S. 341, the Court stating that the capital stock tax "amounts in substance to a specific tax on the coal." Therefore we find that in *Fort Smith Lumber Company* vs. *Arkansas*, *supra*, this Court was considering a property tax, the statute imposing it upon corporations and not upon individuals. The corporation taxpayer objected to the statute upon the ground of discrimination because it was taxed and not individuals and constituted double taxation setting up the Fourteenth Amendment. (See *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, infra, page 62.)

With reference to double taxation this Court said that it was a matter for the State alone and that "the Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax, short of confiscation or proceeding unconstitutional on other grounds." Continuing this Court said,

> "We are of opinion that it also is within the power of a State, so far as the Constitution of the United States is concerned, to tax its own corporations in respect to the stock held by them in other domestic corporations, although unincorporated stockholders are exempt. A State may have a policy in taxation

Quong Wing v. Kirkendall, 223 U. S. 59, 63. If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary although we may not know the precise ground of policy that led the State to insert the distinction in the law.

"The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State. See New York State v. Barker, 179 U. S. 279, 283. We have nothing to do with the supposed limitations upon the power of the state legislature in the constitution of the State. Those must be taken to be disposed of by the decisions of the State Court. As this case properly comes here by writ of error, the application for a writ of certiorari that was presented as a precaution will be denied."

How can it be said, in the light of this decision, that Section 23 of the Pennsylvania Act of June 1, 1889, supra, is invalid, assuming the tax imposed thereby to be a tax upon property. But the tax imposed by the Pennsylvania Act is not tax upon property. A tax measured by the gross receipts of the business of the company taxed is not a property tax.

Plaintiff in Error cites *Gen. Amer. Tank Car Corp.* v. *Day*, 270 U. S. 367. The Louisiana Statute here under consideration imposed a direct property tax. The Appel-

lant corporations were organized under the laws of States other than Louisiana and were not domiciled or licensed to do business in Louisiana though they had property in the State. The statute imposed a tax upon all property within the State but was objected to because it imposed an additional tax for state purposes upon the assessed value of the rolling stock of non-resident corporations having no domicile in the State, the payment of which additional tax exempted non-residents from all local taxation. The statute was held valid, exact equality not being essential in taxation.

In the cited case of *Quong Wing* v. *Kirkendall*, supra, this Court considered a statute of the State of Montana. The statute imposed the tax upon all persons engaged in laundry business other than steam laundry business, with a proviso that it should not apply to women so engaged where not more than two women were employed. The question raised was whether or not such statute was an unconstitutional discrimination depriving the Plaintiff of the equal protection of the laws under the Fourteenth Amendment. It was expressly held by the Montana Court that the statute was a revenue measure simply and not an exercise of the police power. Therefore, the Court had before it a statute designed for the purpose of raising revenue which applied to the laundry business but restricted in its application to persons engaged in laundry business other than the steam laundry business and further restricted in its application by a proviso based upon sex, to wit, that the statute should not apply to women engaged or employed in such business provided that not more than two women were so employed. This Court said (p. 62):

> "A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing

system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a State may carry out a policy, even a policy with which we might disagree. McLean *v.* Arkansas, 211 U. S. 539, 547. Armour Packing Co. *v.* Lacy, 200 U. S. 226, 235. Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 562. It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable or purely arbitrary, as was illustrated in American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89, 92, 95; Williams *v.* Fears, 179 U. S. 270, 276; W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 469."

In the cited case of *American Sugar Refining Co. v. Louisiana*, supra, this Court had before it for consideration a State statute imposing a tax upon persons and corporations carrying on a business of refining sugar and molasses and exempting from such tax, "planters and farmers grinding and refining their own sugar and molasses," and held that such statute does not deny, by reason of such exemption, to sugar refiners, the equal protection within the Fourteenth Amendment. This Court said that the Act undoubtedly discriminated in favor of a certain class of refiners but that this discrimination, if founded upon a reasonable distinction in principle is valid. Further referring to discriminations which were purely arbitrary, oppressive or capricious and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, in which case exemptions would be pure favoritism, this Court said "From time out of mind it has been the policy of this Government, not only *to classify for purpose of taxation*

but to exempt producers from the taxation of the methods employed by them to put their products upon the market."

Various cases were referred to in the opinion among which was the case of *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, wherein it was decided that the equal protection clause did not prohibit a State from requiring, for the admission within its limits of a foreign corporation, such conditions as it chooses, though it exacted a license tax from such corporations, which it did not exact from corporations of its own; and also the case of the *Missouri Railroad Co. v. Mackey*, 127 U. S. 205, in which it was said that this clause did not forbid special legislation, "'and when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.' To the same effect is Walston *v.* Nevin, 128 U. S. 578."

Plaintiff in Error on page 28 of its Brief argues that there is a discrimination by Section 23 of the Pennsylvania Act of June 1, 1889, supra, because of the number and kinds of taxes paid by it as over against the number and kind of taxes paid by others not within the scope of said Section 23 as alleged by the Plaintiff. Assuming for the purpose of argument the correctness of the statement as to the taxes paid by the Plaintiff, though there is no evidence of such fact, what possible bearing can such fact, if true, have upon the question of the validity or invalidity of the Pennsylvania law upon the issue as raised by the Plaintiff? This Court has said repeatedly that "it is not a harbor in which can be found a refuge from ill advised, unequal, and oppressive state legislation." And again that "It is hardly necessary to say that hardship, impolicy, or injustice of

state laws is not necessarily an objection to their validity." The remedy if such be the state of the law is the legislative body not the courts. As was said by this Court in the recent case of *Swiss Oil Corporation* v. *Shanks*, supra, the Fourteenth Amendment does not require uniformity of taxation, does not forbid double taxation, it is "sufficient * * * that there be some adequate or reasonable basis for the classification," and "The particular classification adopted 'is not open to objection unless it precludes the assumption that [it] was made in the exercise of legislative judgment and discretion'."

In the cited case of *Pullman Co.* v. *Knott*, 235 U. S. 23, (Brief for Plaintiff in Error, page 40), this Court considered a statute of the State of Florida imposing a tax upon the gross receipts derived from business done by the Appellant in the State of Florida. The Appellant had paid under one of the Acts of that State, a license tax; under another Act, an ad valorem tax. The property tax had not existed up to 1907 but sleeping and parlor car companies were required to make a return of gross receipts from business done between points within the State and to pay a percentage upon such returns in lieu of all other taxes. But by the law of 1913 the gross receipts tax was continued in force alongside of the new ad valorem tax of 1907 and the Appellant contended that after a levying of a property tax the tax on gross receipts became void. After stating that the Constitution of the State was "not taken up into the Fourteenth Amendment" Mr. Justice Holmes turned to a consideration of the Federal question. The Appellant contended that there was an arbitrary classification "because the tax is confined to sleeping and parlor car companies and does not fall

upon railroads operating their own sleeping and parlor cars." It is to be noted that the classification objected to was between classes of companies, not between artificial creatures, such as corporations and companies created and organized by authority of law, and natural persons. The basis of the objection was the alleged lack of power to separate from the class of corporations certain corporations of the same character and the placing of the latter in a separate class and exempting them from the tax in question. Such is not the instant case. The Pennsylvania Act imposes the tax upon all corporations, domestic and foreign, doing business within the State and with respect solely to such business. The Pennsylvania Act operates uniformly and equally upon all within the class, makes no discrimination or distinction. All within the class being treated alike there is no violation of the Fourteenth Amendment. It is thus seen that the conclusions drawn from the decision in this case by the Plaintiff in Error as stated on page 41 and 42 of its Brief, are beside the point and not sustained by any language of the decision. Indeed the classification attacked in Pullman Co. v. Knott, supra, would find its validity sanctioned in the decision of this Court in Metropolitan Street Rwy. Co. v. New York, 199 U. S. 1.

Conclusive of the instant case is what this Court said in Pullman Co. v. Knott, supra, upon the question raised under the due process clause. The question and the answer of the Court are given in the following language of the opinion, (P. 26).

> "The other objection urged is that the tax payer is not given a hearing. The statute, as we have said, requires the companies to make a report and fixes a percentage ($1.50 per $1000) to be paid. If the report

is not made the Comptroller is to estimate the gross receipts and add ten per cent. of the amount of the taxes as a penalty. If the companies do as required there is nothing to be heard about. They fix the amount and the statute establishes the proportion to be paid over. Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232. The provision in case of their failure to report is not, as it seemed to be suggested in argument, an alternative left open for the companies to choose. It is a provision for their failure to do their duty. In that event their chance and right to be heard have gone by."

In the instant case the Plaintiff in Error filed its Report of Gross Receipts for the six months period ending December 31, 1923, in accordance with the provisions of the Act. The settlement of the tax was made by the Auditor General and State Treasurer, an appeal from the settlement was taken to the Court of Common Pleas of Dauphin County under a general law, the Act of March 30, 1811, 3 Sm. L. Hearing and argument was had, judgment entered, exceptions thereto filed by the Plaintiff in Error. Exceptions were overruled and judgment entered from which an appeal was taken to the Supreme Court, the highest Court of the State, whence by Writ of Error the Plaintiff in Error came to this Court. (R. 9, 33, 41.) What more does the due process clause require? What more can be demanded from the State?

The question before this Court in *Southern Railway Co. v. Greene*, 216 U. S. 400, was stated by the Court (P. 412) as follows:—

"The important Federal question for our determination in this case is: When a corporation of another State has come into the taxing State, in compliance with its laws, and has therein acquired property of a

> fixed and permanent nature, upon which it has paid all taxes levied by the State, is it liable to a new and additional franchise tax for the privilege of doing business within the State, which tax is not imposed upon domestic corporations doing business in the State of the same character as that in which the foreign corporation is itself engaged?"

The Plaintiff, a foreign railroad corporation, was taxed because it was doing business within the State of Alabama. It had come into the State with the permission of the State and had established its business requiring a large amount of fixed and permanent property which it had been permitted to acquire. *Being taxed solely because it was a foreign corporation after it so entered the State and so acquired such property, and no tax being imposed upon domestic corporations, the statute was held invalid.* (See *Northwestern Life Insurance Co. v. Wisconsin*, 247 U. S. 132.) In considering the statute and the business and property of foreign corporations, this Court quoted from Ames v. Union Pacific R. R. Co., 64 Fed. Rep. 165, 177, wherein the distinction and difference between stages (to which the taxicabs of the Plaintiff in the instant case are akin) or steamboats and railroads as to the nature of their property, the permanency of such property as an investment, and its use in transportation are pointed out. The quotation reads as follows:—

> "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent

> investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

This Court said on page 416,

> "We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business."

This is not the case of the Plaintiff in the instant case. The tax imposed by the Pennsylvania Act is not a new and additional tax. The Act was in force twenty-eight years before the Plaintiff in Error acquired the privilege to engage in its business within the State. Its property is not of the kind referred to by this Court as being a factor to be considered in determining the validity of the tax Act there under scrutiny. The Pennsylvania Act applies to all corporations, domestic as well as foreign. All within the class are treated with uniformity and equality. That the classification of the Pennsylvania Act is valid and not violative of the United States Constitution has been determined expressly by this Court in *Flint v. Stone Tracy Co.*, 220 U. S. 108, in which case the scope of *Southern Railway Co. v. Greene*, supra, was outlined.

What a Court says with reference to the application of a rule or principle of law in a case, must be viewed in the light of the facts of such case. So must be the portion of the Opinion of this Court in *Keyster Guano Co. v. Virginia*, 253 U. S. 412, 416, quoted on pages 29 and 44 of Plaintiff's Brief be viewed. This Court was there con-

sidering a statute of the State of Virginia relating solely to domestic corporations concerning which this Court said,

> "We are constrained to hold that so far as c. 472 of the Laws of 1916 operated to impose upon plaintiff in error a tax upon income derived from business transacted and property located without the State because of the mere circumstance that it also derived income from business transacted and property located within the State, while at the same time, under c. 405, other corporations deriving their existence and powers from the laws of the same State and receiving income from business transacted and property located without the State but none from sources within the State were exempted from income taxes, there was an arbitrary discrimination, amounting to a denial to plaintiff in error of the equal protection of the laws within the meaning of the Fourteenth Amendment."

The statute discriminated between members of the class. In no respect does anything here said affect adversely the judgment of the Supreme Court of Pennsylvania in the instant case.

The case of *Kentucky Malting Co. v. Trust*, 280 U. S. 431, cited by Plaintiff in Error (page 28) is not pertinent to the present issue. The license tax was held to discriminate against non-resident manufacturers in favor of resident manufacturers, assuming that the non-resident corporations were doing business with the State (following Southern Ry. Co. v. Greene, 216 U. S. 400) and it not within the State (the Act was held to be practically the imposition of the power of Congress over interstate commerce, and therefore illegal).

The contention made in the decision of the Pennsylvania Supreme Court in *Lane v. Hatch-Stutz Light & Power Co.*, 284 Pa. 173 (pages 17, 18 of Brief for Plaintiff in

Error is based upon an erroneous conception of the decision as a reading of the opinion discloses. The sole question at issue was that of double taxation. It is with this question in mind that the decision must be read. With such question this Court is not concerned. The Act of 1889 is construed by the Pennsylvania Supreme Court in its opinion rendering the judgment which is here for review.

Plaintiff in Error refers to and discusses *Scheyer et al* vs. [illegible] Co., *Keystone Co.*, 284 Pa. 189 (pages 13, 14). This case has no bearing upon the instant case, though the error of the Plaintiff in Error in the construction given to the opinion is shown by what the Pennsylvania Supreme Court said with reference thereto in its opinion in the instant case. The question related to a discrimination between members of the class. (R. 39.)

Plaintiff in Error (pages 30-35) cites *California Railroad Tax Cases*, 17 Fed. 725 and *County of Santa Clara* vs. *Pacific Railroad Co.*, 18 Fed. 385, and quotes from the opinions of the Court in support of its contention. These cases do not affect adversely or in any manner invalidate the judgment of the Pennsylvania Supreme Court in the instant case. Both cited cases dealt with the same provisions of the California Constitution and law. The question before the Court was one of discrimination between members of a class. The subject of tax was the property of both individuals and a certain class of corporations, and the vice of the law lay in its providing one method for the determination of the value of the property for tax purposes when owned by a corporation and a different method when owned by an individual to the injury of the former. A distinction in determining the value of property was held not to be a proper basis for the classification of the property for taxation purposes.

The Constitution of California established the ad valorem rule for the taxation of property and provided for its assessment. What the Court condemned was the rule of law which provided one mode of assessment of the property of natural persons and another for that of railroad corporations. The Court said on page 305 in the latter case:

> [illegible] discrimination is made solely because a rule is adopted in the assessment of the property of one party different from that applied in the assessment of the property of the other, purely on account of its ownership.

Again on page 308 the Court said:

> The ground of complaint is not that any different rate of taxation is adopted, for there is none, but that a different rule is followed in ascertaining the value of the property of railroad corporations as a basis for taxation from that followed in ascertaining the value of property held by natural persons.

The difference in the amount of tax required to be paid by the different owners resulted from the difference in the mode of assessment.

Clearly these decisions do not support the contention of the Plaintiff in Error in the instant case and its argument as to their pertinency discloses the fallacy of the premises upon which such argument is based.

In *Northwestern Life Ins. Co. v. Riverside*, 245 U. S. 132, (Brief for Plaintiff in Error page 42) this Court held that it is no denial of equal protection for a State to impose a different rate upon its own corporations than that imposed upon a foreign corporation for the privilege of doing business within its borders.

The recent decision of this Court in the case of *Hanover Fire Insurance Co. v. Carr* (decided 23 November 1926) 71 L. ed. 224, cited on page 46 of Brief for Plaintiff in Error) supports no contention of the Plaintiff in Error pertinent to the instant case. The statute under consideration in this case discriminated between members of the class made subject to the tax, between foreign and domestic companies, this Court holding,

> "* * * an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 100 per cent of the full value of that property. It is a denial of the equal protection of the laws."

Likewise inapt to the contention of Plaintiff in Error are the following cases cited by it, namely, *Chalker v. Birmingham & Northwestern Railway Company*, 249 U. S. 522 (page 42 of its Brief), the question in which related to Section 2, Article IV of the Constitution of the United States and the discrimination lay in the rate of tax imposed; *In re Home Electric Appliance Corporation v. Day*, 266 U. S. 71 (page 29 of its Brief), was the case of a corporation of Delaware which had much or all of its property in Ohio where it was duly authorized to do business. Therefore the Law of Ohio imposed five cents a share upon a certain proportion of non par shares authorized by the State of Delaware, which the Court found to be arbitrary and not based on a classification of foreign corporations having any reasonable basis.

In the case of *Citizens Telephone Company v. Fuller*, 229 U. S. 322 (page 47 of its Brief), it was held by this Court that there is a clear and reasonable distinction on which to base a classification for taxation between telegraph and telephone companies conducting for profit large businesses and having offices and exchanges in cities and villages, and those conducting small businesses for the mutual convenience of the incorporators and that a statute of the State of Michigan does not deny the larger corporations the equal protection of the laws because it exempts corporations having gross receipts less than $[illegible]. This was so held in the case of a statute which imposed a property tax. This court after pointing out that the Legislature had the power of prescribing the subjects of taxation and exemption, said that the power of exemption seems to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature, and that there is in taxation a broader power of classification than in some other exercises of legislation. Continuing the Court said: (page 331)

> "Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney v. New York, 222 U. S. 525, 536. The State is not bound by an equal equality. This is the rule. Its limitation is that it must not be exercised in clear and hostile discriminations between particular persons and classes." See 222 U. S. 60, 62, 63. Thus defined and thus limited it is a vital principle, giving to the Government freedom to meet its exigencies not binding its action by rigid formulas but appertaining its burdens and permitting it to make those discriminations which the best interests of society require."

Plaintiff in Error has cited numerous decisions of State Courts (Brief for Plaintiff in Error, pages 49-61). It is respectfully submitted that these decisions of State Courts dealing with a tax differing in its nature from that involved in the instant case and with statutes unjustly discriminating between members of the class made subject to the tax and construing Constitutions of a State have no relevancy to the present issue.

It is contended (pages 11-17 of Brief for Plaintiff in Error) that the tax in question "is not a Tax Peculiar to Corporations." What possible bearing can such fact have upon the matter at issue, if fact it be? The Act imposes the tax upon corporations, has done so for a period of upwards of thirty-eight years and more than a quarter of a century before the Plaintiff in Error obtained the right to conduct its business within the State. Prior to the enactment of the law similar taxes were imposed upon corporations, showing clearly that the tax is one which is inherent in the policy and system of taxation in the State of Pennsylvania (see the Penna. Acts of April 30, 1804, P. L. 218; February 22, 1840, P. L. 82; May 1, 1868, P. L. 108; March 20, 1873, P. L. 40; April 24, 1874, P. L. 68; March 20, 1857, P. L. 61; June 7, 1870, P. L. 12; June 1, 1887, P. L. 420). That joint stock companies, limited and registered partnerships and other companies partake of the nature of corporations and are regarded as akin thereto, the hereinbefore cited decisions establish (see Pennsylvania Statutes (West Publishing Company) p. 1305, sections 13002-13061; p. 1605, sections 16500-16655; p. 1612, sections 16656-16684. See also Pennsylvania Statutes, supplement, (West Publishing Company) p. 450, sections 16843a).

If by this contention it is meant that the Legislature has the power to impose such tax upon individuals and has not

done so, the contention here made is valueless. To argue that because the Legislature has the power to impose a tax and does not exercise such power to the full extent, and that for such reason the extent to which it is exercised is invalid, is to beg the question. The power of classification inheres in the Legislature. It has the power to select the subjects of taxation and the right to exercise its judgment. Such judgment is not to be set aside simply because the Plaintiff in Error or a Court does not agree with it. (See *Price v. Illinois*, 238 U. S. 446, 59 L. Ed. 1400, 1405; *Heisler v. Thomas County Co.*, 260 U. S. 245; *Seaboit v. Commonwealth*, 187 Pa. 188.) With the wisdom of the law, its policy, the burdens it imposes, the Courts are not concerned. Such questions must be referred by the taxpayer to Legislature. As was said in *Flint v. Stone Tracy Co.*, supra, page 173: "Courts cannot substitute their judgment for that of the legislature."

It is respectfully submitted that the Contentions of the Plaintiff in Error are invalid.

CONCLUSION

Section 23 of the Act of June 1, 1889, P. L. 420, 431 is sound constitutionally.

The subject of taxation is properly classified.

The tax is imposed upon a subject of taxation which is within the jurisdiction of the Commonwealth and with reference to which the Legislature of the Commonwealth has full power for taxation purposes.

The tax is a tax upon the business and is applied solely to intrastate business, the amount of the tax being measured by the application of a fixed rate of tax to the gross receipts received from the operation and conduct of such

business in the State. This being true and the classification being valid, the taxing statute does not deny to the Plaintiff in Error the due process of law and the equal protection of the Law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

It is respectfully submitted that the judgment of the Pennsylvania Supreme Court should be affirmed.

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OCTOBER [illegible], A. D.

FILED
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Clerk

IN THE

Supreme Court of the United States

QUAKER CITY CAB COMPANY, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

REPLY BRIEF FOR DEFENDANT IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1926. NO. 661

Quaker City Cab Company, Plaintiff in Error,

vs

Commonwealth of Pennsylvania, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

REPLY BRIEF FOR DEFENDANT IN ERROR.

STATEMENT

Defendant in Error not having received the Reply Brief for Plaintiff in Error until Monday, April 18, 1927, the day fixed for the argument of the case, was unable to reply thereto before the time of Argument. With the permission of the Court this Brief is filed.

As pointed out at the oral Argument of the case there was an error made in the printing of the Brief for Defendant in Error upon page 31 thereof. The quotation at the

end of the first paragraph on such page which reads, "such may be the tendency of the legislation but so long as the privilege is not restricted to New York Corporations it is not perceived that thereby no ground is afforded to justify the intervention of the Federal Court," should read, "Such may be the tendency of the legislation but so long as the privilege is not restricted to New York Corporations it is not perceived that thereby any ground is afforded to justify the intervention of the Federal Court . . ." New York State . . . Roberts, 171 U. S. 658, 662.)

It is the purpose of this Brief, supplementing the principal Brief, to point out the invalidity of the contentions of the Plaintiff in Error and correct erroneous statements contained in the Brief of Plaintiff in Error.

STATUTE OF THE LAW

This subject is fully covered in the principal Brief for Defendant in Error (pages 6-13) and calls for no further discussion here. It is pertinent to call the attention of the Court particularly to the portion of the Opinion of the Supreme Court of Pennsylvania appearing in the next paragraph upon page 38 of the Record and page 10 of the principal Brief of the Defendant in Error and which is omitted from the Brief of the Plaintiff in Error. Pertinent here also is what this Court said as to the nature of the tax imposed by the Pennsylvania Act of March 20, 1877, P. L. 6 in the case of *Pennsylvania Steamship Co. vs. Pennsylvania*, 122 U. S. 326, as to the theory of a tax being laid upon a "fund," expressly repudiating such theory (see pages 341-342 of the Opinion and pages 41-42 of principal Brief for Defendant in Error). Pertinent also is it to note what this Court said in the same case

as to the theory of an "income tax" (pages 344, 345 of the Opinion and pages 40-42 of principal Brief for Defendant in Error). What this Court there said expressly negatives the contention of the Plaintiff in Error made upon page 3 of its Reply Brief as to the applicability of decision of this Court in the case of *Pollock* vs. *Farmers' Loan & Trust Company*, 158 U. S. 601, 625, to the instant case.

It is also to be noted that the property tax imposed upon corporations and *quasi* corporations is imposed by Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, and not by Section 23 which is here under consideration (see page 11 of principal Brief for Defendant in Error).

Section 23, *supra*, defines different classes of taxables, the Plaintiff in Error being in the class of transportation companies. The language of the Section applicable to the instant case is set forth in the Opinion of the Pennsylvania Supreme Court (R. 34).

COMPETITION

Competition between corporations and natural persons can have no bearing upon the question here involved. The nature of the tax and the character of the taxables is not changed by reason of competition in business. This was expressly ruled by this Court in the case of *Hexter* vs. *Pittsburg Coal Company*, 188 U. S. 245.

Pertinent here is the language of this Court in the case of *Lowe* vs. *State Tax Co.*, 220 U. S. 107, on pages 161, 162, of the Opinion when considering the Fourteenth Amendment. (See also pages 28, 29 of principal Brief for Defendant in Error.) Pertinent here is it to state that in the case of Commonwealth vs. Harrisburg Light & Power

Co., 284 Pa. 175, referred to by Plaintiff in Error, the tax was a fixed mercantile license tax with an additional amount determined by the volume of business including cash and credit sales, imposed upon dealers in and vendors of goods, wares and merchandise. It supports no contention of the Plaintiff in Error." It is doubtless sufficient to refer to what the Supreme Court of Pennsylvania said upon this matter (R. 38):

REPORT AND SETTLEMENT OF TAXES INVOLVED

The Court below said expressly in its Opinion (R. 34) that the settlement from which the appeal in the instant case was taken is "for the six months ending December 31, 1923," and that such settlement was made "Early in 1924. * * *" Upon appeals from settlements for other periods than the one here involved, the rights and liabilities of the Plaintiff in Error therein will be determined upon a trial thereof under the provisions of the general law of the Commonwealth, to wit, the Act of March 30, 1811, P. L. 143, § 8; Pa. L. 229, the Act under which the present appeal was taken. (See also R. 9, 22, 37.)

CONTENTIONS OF PLAINTIFF IN ERROR

I think it can be said truthfully that no one of the contentions of the Plaintiff in Error set forth under Headings I, II, III, IV and V of its Reply Brief, is sound in fact or law. That (1) the position of the Plaintiff in Error taken in both its written and oral argument is not misconceived, is clear; that (II) a "business tax" or a "tax upon business"

is a tax known to the law, it is submitted, calls for no argument; that (III) the Defendant in Error has not misinterpreted the facts a reading of the Record and its Briefs discloses; that (IV) the Defendant in Error has not "misconstrued" the decision of this Court in the Case of Fort Smith Lumber Company vs. Arkansas, 251 U. S. 532 is, it is submitted, clear upon a reading of the principal Brief for Defendant in Error, pages 47, 48, 49; and that (V) the cases cited by Defendant in Error do sustain the Conclusion of the Pennsylvania Supreme Court a reading thereof will disclose.

CONCLUSION

This Court is dealing here with the exercise of a sovereign power of a State as to a subject admittedly within its jurisdiction. Both the taxables and the subject matter of the tax are within the taxing power of the State and subject to its jurisdiction. There is no discrimination between members of the class. (See District of Columbia vs. Brooke, 214 U. S. 138, 150, cited in Hensler vs. Thomas Colliery Co., *supra*.)

It is respectfully submitted that the classification adopted is valid, that it does not "preclude the assumption that [it] was made in the exercise of legislative judgment and discretion."

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